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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RIVCOM CORPORATION,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state administrative agency order enjoining enforcement of a valid state-court judgment violates the First Amendment right of access to the courts.

2. Whether a state labor relations agency may order the lessee of a new owner of a farm to maintain migrant labor housing that does not, and, as a practical matter, cannot comply with federal or state health and safety requirements, when the operation of such housing is prohibited by federal law.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, Rivcom Corporation ("Rivcom"), respectfully prays that a writ of certiorari issue for review of the judgment of the Supreme Court of the State of California, on October 17, 1983, and the denial of Rivcom's timely petition for rehearing on November 16, 1983.

OPINIONS BELOW

The opinion of the California Supreme Court (App. 1a) is reported officially at 34 Cal. 3d 743, and unofficially at 670 P.2d 305 and 195 Cal. Rptr. 651 (1983). The opinion of the Fifth District Court of Appeal (App. 38a), is unpublished. The decision and order of the California Agricultural Labor Relations Board (App. 99a) is unpublished. The Administrative Law Officer's decision (App. 125a) is unpublished.

JURISDICTION

The opinion of the Supreme Court of the State of California was filed on October 17, 1983 (App. 1a). Rivcom's timely petition for rehearing was denied on November 16, 1983 (App. 208a), and judgment was entered on November 17, 1983 (App. 209a). This petition is filed within ninety days of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS[1]

The Supremacy Clause, U.S. Const. art. VI, cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Health & Safety Code (West 1983).

> **§ 17922.** *Uniform housing code requirements; local requirements*
>
> (a) Except as otherwise specifically provided by law, the building standards adopted and submitted

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[1] Relevant sections of the California Labor Code have been reproduced in the Appendix at 210a *et seq.*

by the commission for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 and the other rules and regulations adopted, amended, or repealed from time to time pursuant to this chapter shall impose substantially the same requirements as are contained in the most recent editions of the following uniform industry codes as adopted by the organizations specified:

(1) The Uniform Housing Code of the International Conference of Building Officials, except its definition of "substandard building."

* * *

§ 17980. *Buildings in violation, abatement; substandard buildings, repair or demolition; notice to tenants*

(a) If any building is constructed, altered, converted, or maintained in violation of any provision of, or of any order or notice giving a reasonable time to correct such violation issued by an enforcement agency pursuant to, this part, the building standards published in the State Building Standards Code, or other rules and regulations promulgated pursuant to the provisions of this part, or if a nuisance exists in any building or upon the lot on which it is situated, the enforcement agency shall, after 30 days' notice to abate such nuisance, institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance.

(b) Whenever the enforcement agency has inspected or caused to be inspected any building and has determined that such building is a substandard building, the enforcement agency shall commence proceedings to abate the violation by repair, rehabilitation, vacation, or demolition of the building. The enforcement agency shall not require the vacating of a residential building unless it concurrently requires expeditious demolition or repair to comply with the provisions of this part, the building standards pub-

lished in the State Building Standards Code, or other rules and regulations promulgated pursuant to the provisions of this part. The owner shall have the choice of repairing or demolishing. However, if the owner chooses to repair, the enforcement agency shall require that the building be brought into compliance according to a reasonable and feasible schedule for expeditious repair. The enforcement agency may require vacation and demolition or may itself vacate the building, repair, demolish, or institute any other appropriate action or proceeding, if repair work is not done as scheduled or if the owner does not make a timely choice of repair or demolition.

(c) Notwithstanding the provisions of subdivision (b) of this section and notwithstanding local ordinances, tenants in a residential building shall be provided notice of an order to demolish, of the enforcement agency's decision to demolish, or of the issuance of a demolition permit following upon abatement order of an enforcement agency.

STATEMENT OF THE CASE

Petitioner Rivcom Corporation ("Rivcom") is a California corporation engaged in farming a 4300-acre ranch it leases in Ventura County, near Fillmore, California.[2] Approximately 1500 acres of the ranch have been used for many years to grow citrus fruits and avocados, with the remaining acreage in mountain pasture land. Rivcom is a subsidiary of Riverbend Farms, Inc. ("Riverbend"), which owns and operates a produce packing and marketing facility in Fresno County. For many years, Riverbend has packed and marketed citrus grown by farmers

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[2] As explained in more detail *infra*, the ranch has been owned since January 1979 by Newport Beach Development Company ("Newport"), an unrelated corporation. The ranch will be referred to herein as "Rancho Sespe," its Spanish land-grant title.

throughout California, including Ventura County. It obtains this fruit by providing farmers with the pruning, harvesting and hauling services of Triple M Farms, Inc. ("Triple M"), a state-wide independent custom harvester. Mr. Larry R. Harris is the president of both Rivcom and Riverbend and the principal shareholder of Riverbend.

Respondent Agricultural Labor Relations Board ("ALRB") is a California administrative agency charged with regulating agricultural labor relations within the state.[3] The ALRB is empowered to conduct representation elections, to determine and certify appropriate bargaining units, and to deal with unfair labor practices in the agricultural setting.

Respondent United Farm Workers ("UFW") is an unincorporated labor association that acts as the bargaining representative for member farm laborers in California and elsewhere.

From 1973 to early 1979, Rancho Sespe was owned by PIC Realty Corporation, a subsidiary of Prudential Insurance Company, and managed by National Property Management Systems, Inc. ("NPMS"). In May 1978, following a representation election, the ALRB certified the UFW as the bargaining representative of all of NPMS' agricultural employees within the State of California. App. 41a. Following that certification, NPMS and

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[3] The ALRB was established in 1975 by the Agricultural Labor Relations Act ("ALRA"), codified at Sections 1140-1167 of the California Labor Code. The ALRA, which was patterned after the National Labor Relations Act, applies only to agricultural labor relations within the state of California. Although agricultural workers are not within the jurisdiction of the federal labor regulatory scheme, the ALRB must follow NLRA precedent where applicable. Cal. Lab. Code § 1148 (West Supp. 1983) (App. 212a).

the UFW engaged in good faith bargaining, but they were not able to reach a contract. *Id.*

On January 16, 1979, the ranch was sold to Newport Beach Development Company, Inc., ("Newport") a corporation formed to hold the ranch for development purposes.[4] On the same day, Newport *leased* the ranch to Rivcom. Mr. Harris, as president of Rivcom, decided to enter into the lease in order to obtain additional fruit for Riverbend's packing and marketing operation. It was intended that Rivcom would farm the ranch, while Riverbend, in partial payment for the citrus, would provide custom pruning, harvesting and hauling services through a contract with Triple M, as it did with other farms from which it obtained fruit.

Before Rivcom took possession under the lease, Mr. Harris toured the ranch and realized that drastic changes in its operation would be required. App. 41a. The ranch had been losing money for at least five years prior to the sale, and the reasons for this lack of profitability were immediately apparent. The ranch was being operated in an outmoded, labor-intensive manner which severely impeded the ability to make a profit.[5] App. 150a. Under the

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[4] Newport is not related by ownership to Rivcom, Riverbend, or Mr. Harris.

[5] Many of the trees in the orchards had not been pruned for ten years or longer, and some had grown as tall as thirty-five feet, rendering harvesting operations difficult and time-consuming. Harvesting methods in general were antiquated. App. 151a. In addition, NPMS had been using its own employees to harvest and pack the crops and to perform maintenance and pest control work that, because of its sporadic nature, can be contracted out at less cost. App. 151a-153a. A substantial portion of the ranch was still using cultivation, rather than pre-emergent herbicides, for weed control. App. 61a. In addition, the ranch had an extensive system of smudge

former ownership, the ranch had been operated as a self-contained unit, with enough equipment and workers to perform every task without ever having to contract for services from outside organizations. Mr. Harris believed that with careful planning he could reduce the ranch's year-round work force from 140 to approximately 25 laborers.

1. The Unlawful Detainer Proceedings

Seventy acres of ranch property, or roughly 5% of the arable land, was being used to provide housing for the 140 agricultural workers NPMS had employed to work on the ranch. The labor camp housing was at least thirty-five years old and was in such dilapidated and unsafe condition that it was not economically feasible to repair it.[6] App. 185a, 188a. In light of the condition of the housing and the need to reduce the size of the ranch's labor force, Mr. Harris realized that an important step toward making the ranch profitable would be to raze the housing and use the land on which it had been located to raise additional crops.

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pots for frost protection, whereas wind machines are cheaper and require less labor. App. 151a. Most of the ranch was still using a labor-intensive high-volume furrow irrigation system, rather than a modern low-volume system such as mist emitters. App. 61a. Significant amounts of capital were tied up in pickup trucks, tractors, and harvesting and frost protection equipment that could be used only on a seasonal basis. App. 153a. Modern farming techniques demand that such equipment be leased or obtained on a contract basis rather than owned by an individual ranch. The ranch even had its own machine shops, equipped with lathes, drill presses, welding equipment and an extensive collection of spare parts for ranch machinery.

[6] The Ventura County Municipal Court later found that renovation and repair would cost $20,000 per house. App. 188a. Even to maintain the housing in its dilapidated condition was costing $70,000 per year, or 3% of the ranch's overall expenses. App. 166a.

Anticipating that he would encounter considerable resistance from these workers to his plan for changing the operational methods of the ranch, Mr. Harris determined not to hire former NPMS employees, but rather to depend upon employees who had worked for Riverbend or for Triple M in the past and who not only were familiar with modern farming methods and the pruning and harvesting techniques he planned to implement, but also would not require employer-provided housing.[7]

Under a written license agreement between the employees and NPMS, the employees had twenty-four hours to vacate the housing upon termination of their employment. On January 16, 1979, an NPMS official informed the employees that the property had been sold and that their jobs were terminated. He advised them that they had twenty-four hours to vacate the property. App. 41a. Although it had no obligation to do so, Rivcom, as the new lessee and operator of the ranch, delivered informal notices to each of the residences later that afternoon, extending that period to thirty days. App. 41a. Nine days later, Rivcom served on each of the residents a formal thirty-day Notice to Quit.[8] App. 183a. Beginning on February 25, after the formal thirty-day period had elapsed,

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[7] Mr. Harris' decision also rested on the management principle of not hiring any of the predecessor's employees, App. 49a-55a, a principle he had used successfully in earlier acquisitions of other failing agricultural operations, including an 80-employee packing facility and three small citrus ranches. App. 144a.

[8] One resident, Francisco Casas, was occupying labor camp housing not as an NPMS employee, but on an oral month-to-month tenancy. App. 183a. Casas was served with a written notice to vacate on March 12, 1979. App. 184a.

Rivcom filed a series of unlawful detainer actions against each of the tenants in Ventura County Municipal Court.[9]

Trial in the unlawful detainer proceeding began on October 22, 1979, and concluded on December 30, 1979, after thirty-one days of testimony. On April 22, 1980, the court issued a detailed opinion finding, among other things, that the laborers' housing was in substandard condition *before* the eviction notice was given, and that the decision to raze the housing was based on the prohibitive costs of rehabilitating it. Three days later the court entered judgment granting Rivcom an order of possession against each of the tenants and damages totaling $185,000.[10]

Meanwhile, the ALRB had been conducting administrative proceedings on unfair labor practice charges based on Rivcom's failure to hire or bargain with the former NPMS employees and its attempt to evict them.[11] On August 17, 1979, the ALRB found that Rivcom had committed the practices charged and ordered Rivcom to cease and desist from evicting or attempting to evict the former NPMS employees. On May 1, 1980, the ALRB sought from the California Supreme Court a writ of mandate compelling the Ventura County Municipal Court to

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[9] The unlawful detainer complaints were consolidated in a single case, *Rivcom, Inc. v. Rangel*, Consolidated No. MC 1913 in the Civil Department of the Ventura County Municipal Court. The court's opinion and order are reproduced in the Appendix at 181a-207a.

[10] The damages were for unpaid rent, water, sewage and garbage disposal, and utilities. App. 191a. The trial court found that the minimum reasonable rental value of the houses was $125 in one of the two villages, and $140 in the other. App. 185a.

[11] The ALRB proceedings are described in more detail *infra* at 12-14.

set aside its unlawful detainer judgment and to stay all proceedings pending Rivcom's petition for review of the Board's order in the labor proceeding, then pending before the Fifth District Court of Appeal. On April 30, the tenants filed identical motions to stay. On July 3, 1980, the California Supreme Court stayed all further proceedings in the Ventura County Municipal Court pending the Court of Appeal's review in the labor case.

On May 23, 1980, the tenants appealed the municipal court's unlawful detainer judgment to the Ventura County Superior Court. The tenants then obtained a series of *ex parte* orders, extending the time in which to file their Notice to Prepare the Clerk's and Reporter's Transcripts until thirty days after determination of Rivcom's petition for review in the labor proceeding. That stay remained in effect until August 9, 1982, when it was lifted by a unanimous three-judge panel of the Ventura County Superior Court.

On August 23, 1982, the tenants filed with the California Supreme Court a petition for a writ of mandate directing the superior court to set aside its August 9, 1982 order. On September 22, 1982, the Supreme Court denied that request—thus permitting the appeal to proceed—but indicated that its July 3, 1980, order staying proceedings continued to apply to any proceedings to enforce the unlawful detainer judgment. That stay was still in effect when the California Supreme Court issued its decision on October 17, 1983, affirming the ALRB's order in the labor case. The Board's order effectively precludes further attempts to enforce the unlawful detainer judgment.

2. The Condemnation Proceedings

As noted above, the Ventura County Municipal Court found that the laborers' housing on Rancho Sespe was in

dilapidated condition before Rivcom acquired the leasehold. From the outset, Rivcom sought simply to raze the housing rather than to perform costly repairs.

Serious problems continued to plague the facilities. On February 12 and 13, 1980, the Division of Building and Safety of the Ventura County Resource Management Agency notified Rivcom of its administrative determination that the dwellings were dangerous to the health and safety of the occupants and the public in general because of defective gas piping and breakdown of the sewage disposal system. County officials posted notices on the dwellings on April 29 and May 12, 1980, informing the occupants that they must vacate the premises by May 12, 1980. Under Uniform Housing Code § 1104(b),[12] any person occupying a house in violation of such notice has committed a misdemeanor and is subject to prosecution. The tenants refused, however, to vacate the property.[13]

On April 18, 1980, the Division of Building and Safety filed a complaint in Ventura County Superior Court against Newport, Rivcom, the UFW, the Board and the tenants, seeking abatement of the nuisance. The court issued a preliminary injunction on June 25, requiring Rivcom and Newport to make certain preliminary repairs

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[12] The Uniform Housing Code has been incorporated into California law. Cal. Health & Safety Code § 17922(a)(1) (West Supp. 1983).

[13] When Newport's and Rivcom's repeated demands upon the Ventura County sheriff to remove the occupants who remained proved futile, Newport brought two identical suits, one in the Ventura County Superior Court and one in the United States District Court for the Central District of California, seeking a writ of mandate compelling the sheriff to act. Relief was denied in both cases on the grounds that the California Supreme Court had indicated its desire to defer any eviction action pending resolution of the labor proceedings.

and requiring the tenants not to resist these repairs. Rather than make the repairs, however, Rivcom and Newport elected, as they are entitled to do under Section 17980(b) of the California Health & Safety Code, to abandon and destroy the premises.

On appeal from this preliminary injunction, the Second District Court of Appeal held on July 29, 1983, that Rivcom and Newport had an absolute right to abandon, rather than repair, the labor housing. The court held that "merely because the occupants presently cannot be evicted does not justify depriving Rivcom and Newport of their option under the law to demolish the camp rather than incur the considerable expense of bringing it up to acceptable standards for what may turn out to be a very limited period of time. . . . [They] have a legal right to comply with an order of abatement . . . by demolishing the offending structures." *Ventura County v. Newport Beach Development Co.*, Civ. No. 62309, slip op. at 15 (Cal. Ct. App., 2d Dist. July 29, 1983).

On August 31, 1983, the tenants petitioned the California Supreme Court for review of the Second District Court of Appeal's decision. The California Supreme Court's opinion in the labor proceeding noted that the matter was still pending on appeal. *See* App. 32a.

3. The Labor Proceedings

On January 18, 1979, two days after Rivcom became the lessee of Rancho Sespe, the UFW filed an unfair labor practice charge against Rivcom with the ALRB alleging violations of Section 1153(a), (c) and (e) of the ALRA. A UFW agent telephoned Rivcom's attorney demanding that Rivcom recognize the union, reinstate all of the displaced employees, withdraw its eviction notices and begin immediately to bargain about operational changes

and a permanent contract. App. 4a. Believing that it was not a successor to NPMS' bargaining obligations and that recognition of the union would itself be an unfair labor practice under California law,[14] Rivcom declined these demands. On February 5, Mr. Harris received a letter from the UFW seeking employment for approximately 140 named persons. App. 5a. On the same day, Rivcom was served with a second unfair labor practice charge. *Id.*

Based on these two unfair labor practice charges, the ALRB issued a complaint against Rivcom, alleging that Rivcom had succeeded to NPMS' bargaining obligation under the ALRA, and that its refusal to hire or bargain with the UFW violated that Act. It also alleged that Rivcom had discriminated in regard to a condition of employment by attempting to evict the tenants from housing provided to them by NPMS as a condition of their employment, in violation of Section 1153(a) and (c). App. 127a.

The matter was heard before an Administrative Law Officer ("ALO") on eighteen hearing days between March 9 and April 13, 1979. Rivcom's position was that it had not succeeded to NPMS' bargaining obligation, and that its failure to hire or bargain with the former NPMS employees was based upon valid business reasons, rather than upon their union membership. App. 127a. Rivcom de-

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[14] Section 1153(f) of the California Labor Code (App. 213a) declares it to be an unfair labor practice to recognize or bargain with "any labor organization not certified pursuant to the provisions of this part." It was not until 1981, two years after the bargaining demands were made upon Rivcom, that the California Supreme Court ruled that the Section 1153(f) prohibition had no application in successorship cases. *See San Clemente Ranch, Ltd. v. ALRB*, 29 Cal. 3d 874, 633 P.2d 964, 176 Cal. Rptr. 768 (1981); *Highland Ranch v. ALRB*, 29 Cal. 3d 848, 633 P.2d 949, 176 Cal. Rptr. 753 (1981).

fended its attempted evictions as required by the dilapidated condition of the housing and its desire to use that land for crop production.

On June 6, 1979, the ALO issued a decision finding that Rivcom had committed the unfair labor practices charged. With respect to the eviction issue, the ALO found that the "desire to remove from the ranch the former workers, whom he did not want as employees because of their union membership and the impact of their membership on the successorship issue," App. 168a, was a violation of Section 1153(a) and (c) of the ALRA. The ALO issued a proposed order directing Rivcom to cease and desist from discouraging union membership by attempting to evict or evicting the former NPMS employees from housing at the ranch "provided them as a condition of their employment." App. 176a. The proposed order also required Rivcom to refrain from any effort to evict the former employees without first bargaining in good faith with the UFW about any such proposed changes and either reaching agreement with the UFW or arriving at a bona fide impasse. App. 177a.

On August 17, 1979, the ALRB, acting through a four-member panel, affirmed the ALO's decision and entered an order requiring Rivcom to cease and desist from discouraging union membership "by attempting to evict, or evicting, those employees from housing at [Rancho Sespe] provided them as a condition of their employment by NPMS." App. 117a. An intermediate appellate court reversed the Board, but on October 17, 1983, the California Supreme Court reversed the lower court and upheld the Board's decision.[15] It is this order Rivcom asks this Court to review.

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[15] On July 12, 1983, after its briefs had been submitted but before any ruling had been issued, Rivcom filed a written request asking the

REASONS FOR GRANTING THE WRIT

A. The California Supreme Court Has Violated Petitioner's First Amendment Right Of Access To The Courts.

In the proper court, and following the proper procedures, Rivcom obtained on April 24, 1980, a valid and binding unlawful detainer judgment for possession and damages against each of the tenants then occupying the labor camp housing. Three and a half years later, while reviewing an entirely distinct administrative order, the California Supreme Court issued a decision that simply precluded all efforts to enforce that judgment—blotting out that judgment as completely as if it had never existed. The court made no attempt to harmonize Rivcom's property rights as a landlord with the interests of its tenants as employees. It did not discuss the overlapping—and, in this case, conflicting—jurisdiction of the ALRB and the Ventura County Municipal Court. It did not even acknowledge the careful and detailed findings and conclusions of the trial court, many of which directly contradict those of the ALRB. Instead, the Supreme Court simply shelved Rivcom's valid judgment for possession and damages, and threatened that Rivcom would carry a "heavy burden" to show its good faith even if eviction should be undertaken by the county for health and safety reasons.

By short-circuiting enforcement of the unlawful detainer judgment, the California Supreme Court has deprived Rivcom of any meaningful opportunity to obtain a judicial

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state Supreme Court to take judicial notice of this Court's May 31, 1983, decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, ___ U.S. ___, 103 S. Ct. 2161, and to recognize the impact of that decision on the interplay between the Board's order and the unlawful detainer judgment. *See infra* at 16-20.

remedy for its acknowledged rights as a landlord, and thus has violated Rivcom's constitutional right of access to the courts.[16] This First Amendment right has been defined by this Court and was recently explicated in *Bill Johnson's Restaurants, Inc. v. NLRB*, ___ U.S. ___, 103 S. Ct. 2161 (1983). In *Bill Johnson's*, a case involving the National Labor Relations Board, the Court banned as unconstitutional exactly what the ALRB and the California Supreme Court have done in the instant case: to prohibit the prosecution in state court of legally cognizable, and ultimately meritorious, state-law claims.

Bill Johnson's is the most recent in a long line of cases in which the Court has examined the power of state courts to provide a civil remedy for conduct involved in labor disputes. This issue arises frequently from the interplay between, on one hand, the powers granted by Congress to the National Labor Relations Board to regulate industrial labor relations, and, on the other hand, the powers resident in state courts to deal under state law with illegal or tortious conduct arising in the context of labor strife. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). In these cases, the Court has repeatedly recognized the constitutional right to seek redress in state tribunals of

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[16] The instant case thus differs markedly from *Abatti Farms, Inc. v. ALRB*, No. 83-190, which this Court recently declined to review. Abatti's complaint was that it was subject to an ALRB order that had received *no* judicial review on the merits prior to enforcement. Rivcom complains not of a lack of judicial review, but of the constitutionality of the reviewing court's conclusions.

wrongful conduct for which the NLRB could afford no remedy—either because the claim was not before it, as in the *Sears* case, *see* 436 U.S. at 201-202, or because the agency simply lacked the power to provide a remedy for the wrongful conduct involved, *see, e.g., Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977) (tort claim for intentional infliction of emotional distress); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (libel).

The employer in *Bill Johnson's* filed suit in state court against several employees who had picketed the employer's restaurant after the discharge of a waitress allegedly because of her efforts to organize a union. 103 S. Ct. at 2165. The employer's suit followed the waitress' filing of an unfair labor practice charge with the NLRB. The Board found that the lawsuit was retaliatory in nature, *i.e.*, intended to penalize or discourage employees from filing charges with the Board, *id.* at 2166, and ordered the employer to withdraw its state court complaint. *Id.* at 2167. The Court of Appeals enforced the Board's order in its entirety.

This Court vacated the appellate court's decision and remanded the case to the Board, holding that the agency cannot enjoin as an unfair labor practice a well-founded state court lawsuit even if it was filed solely for retaliatory purposes. *Id.* at 2170. The decision was based squarely on the constitutional right of access to the courts, "an aspect of the First Amendment right to petition the Government for redress of grievances." *Id.* at 2169 (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). "If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the 'Board can award no damages,

impose no penalty, or give any other relief to the plaintiff." *Id.* at 2169-70 (quoting *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63 (1966)).

The Court held that the Board may properly enjoin "baseless" litigation brought solely for retaliatory purposes, since neither the First Amendment nor any compelling state interest protects such a suit. The test for determining whether a suit is baseless, however, is not whether it was filed for retaliatory purposes, but whether there is a genuine issue of material fact or a genuine state-law legal question. 103 S. Ct. at 2171-72. When a suit presents genuine factual issues, both the First Amendment and the state's interest in the health and welfare of its citizens militate strongly against a construction that permits the agency "to usurp the traditional fact-finding function of the state-court jury or judge." *Id.* at 2171. Thus, the Court concluded that "if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the . . . unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded." *Id.* at 2171-72. Similarly, the Board should permit the state judiciary to rule on state-law legal questions "if there is any realistic chance that the plaintiff's legal theory might be adopted." *Id.* at 2172. If the employer prevails in the state court suit, he "should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 2172.

Thus, three rules emerge from the *Bill Johnson's* decision. First, the Labor Board may not enjoin a state court lawsuit that presents any genuine factual or legal issue, even if it was brought solely for retaliatory purposes. Second, the Board must stay its proceedings until the

state court proceedings have concluded. Finally, an employer who prevails before the state tribunal should also prevail before the Board.

The holding in *Bill Johnson's* is directly relevant to Rivcom's situation, not only because the California legislature has expressly directed the ALRB to follow "applicable precedents" under the National Labor Relations Act, Cal. Lab. Code § 1148 (West Supp. 1983) (App. 212a), but also as an interpretation by this Court of federal constitutional rights. Like the employer in *Bill Johnson's*, Rivcom sought redress in state court for conduct arguably within the jurisdiction of a labor relations agency. In both cases, the employees charged that institution of the state court suit was retaliatory and therefore constituted an unfair labor practice. And in both cases, the board agreed and entered an order precluding further prosecution of the state-court proceeding.

Moreover, the interests at stake in each case are identical. Regardless of whether an injury springs from libel, as in *Bill Johnson's*, or from refusal to relinquish possession of real property, as in Rivcom's case, the First Amendment interest in protecting the right to seek redress in a judicial tribunal is the same. Just as the NLRB cannot redress a libelous injury, 103 S. Ct. at 2169-70, neither can the ALRB enforce the right to possession of real property or award damages for unlawful detainer.

The *Bill Johnson's* decision was before the California Supreme Court when it issued its *Rivcom* opinion. Correct analysis and application of *Bill Johnson's* would have led inevitably to the conclusion that the ALRB is powerless to enjoin, as an unfair labor practice, the prosecution of an unlawful detainer action or to prevent enforcement of a judgment validly obtained in that action. *See* 103 S. Ct. at 2170. Instead, the ALRB should have awaited the

outcome of Rivcom's unlawful detainer proceedings in Ventura County Municipal Court, and that court's resolution of factual issues is binding on the agency. *See id.* at 2171-72.[17]

Finally, having prevailed in the municipal court, Rivcom was entitled to prevail on the eviction issue in the ALRB proceedings. *See id.* at 2172. In short, had it correctly applied *Bill Johnson's*, the California Supreme Court could not have upheld the ALRB ruling that Rivcom's attempted evictions were an unfair labor practice.[18]

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[17] Had the ALRB followed such a course, it would have greatly affected the outcome of the labor case, since the ALRB and the court reached conflicting or contradictory conclusions on many key factual questions. For example, the trial court found that the housing was in dilapidated condition before Rivcom entered the lease, App. 185a, 188a, that valid financial considerations supported Rivcom's decision to abandon and demolish the labor camp housing, App. 188a, and, most importantly, that Rivcom's dominant purpose in instituting the eviction actions was neither retaliatory nor discriminatory against union membership, App. 190a. The ALRB, on the other hand, reached the opposite conclusion on each of these questions. App. 111a-113a. The California Supreme Court upheld the Board's conclusions with no reference to the municipal court's conflicting findings. App. 17a.

[18] In rejecting *Bill Johnson's*, as well as in upholding the ALRB's ban on evictions, the California Supreme Court relied on its own decision in *Vargas v. Municipal Court*, 22 Cal. 3d 902, 587 P.2d 714, 150 Cal. Rptr. 918 (1978). App. 32a-33a. In *Vargas*, the court upheld a municipal court's authority to adjudicate an unlawful detainer action arising from an agricultural labor dispute. *Id.* at 916, 587 P.2d at 723, 150 Cal. Rptr. at 927. It held, however, that "appropriate deference to the primacy of the ALRB's role" in the labor area must be maintained by providing that "while the municipal court's determinations are binding within the context of the unlawful detainer action, such determinations should have no res judicata or collateral estoppel effect in the related ALRB proceedings." *Id.* at 916, 587

But the California Supreme Court did not even consider these points. Its discussion of *Bill Johnson's*, which is confined to a single footnote, demonstrates a total misperception of the import of the *Bill Johnson's* decision. Rather than analyzing the substantial constitutional concerns this Court addressed in its ruling, the California court chose to dispose of the case on specious jurisdictional distinctions and a downright distortion of its holding.

First, the California court held that "where a dispute concerns activities arguably protected or prohibited by the labor relations statute, the Board, not the courts, has primary jurisdiction." App. 27a n.25. The "arguably protected or prohibited" language is a reference to the general principle that the NLRB has exclusive jurisdiction over conduct that involves practices arguably either protected or prohibited under the NLRA. *See generally San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Wholly apart from the question of whether this preemption doctrine, developed as a rule of federal-state comity, can be transposed wholesale to an arena in which solely state-created rights are involved,[19] *Bill Johnson's* specifically held that there can be no NLRB preemption of state

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P.2d at 723, 150 Cal. Rptr. at 927. *Vargas* requires the state court to stay its proceedings, at least temporarily, to permit the ALRB to rule, and gives the court's findings no precedential value in the labor proceedings. Thus, *Vargas* and this Court's ruling in *Bill Johnson's* are completely at odds.

[19] A California court has noted in this connection that "there are aspects of agricultural labor relations and its regulation in California which militate against an overly rigid application of federal [preemption] principles." *Bertuccio v. Superior Court*, 118 Cal. App. 3d 363, 371-72, 173 Cal. Rptr. 411, 416 (1st Dist. 1981).

court proceedings that arose out of an employer's allegedly retaliatory motivation. 103 S. Ct. at 2171-72. Thus, *Bill Johnson's* specifically rejected the jurisdictional limitations on which the California Supreme Court relied.

The California court also held that "[a]n employer has no right to discharge his resident workers, then commence eviction procedures, when his purpose is to combat or punish activities protected by the ALRA. As a matter of law, retaliatory suits of that kind have no 'reasonable basis,' and their use is an unfair practice the Board may enjoin." App. 27a n.25 (citation omitted). Not only does this conclusion contradict the trial court's findings,[20] but it stands the *Bill Johnson's* rule on its head: while this Court in *Bill Johnson's* held that "baseless" lawsuits may be enjoined, it specifically rejected the contention that retaliatory motives determine whether a suit is baseless. 103 S. Ct. at 2170-71. Rather, the Court held that the NLRB can enjoin a suit as baseless, and cut off an employer's First Amendment right of access to the courts, only if the suit presents no genuine factual or legal issues. Motivation is irrelevant. *Id.* at 2171. Rivcom's unlawful detainer suit not only presented genuine issues of material fact, but actually resulted in entry of judgment in Rivcom's favor. Clearly, the suit was not "baseless."

The right to petition for redress of grievances is an empty promise if a successful petitioner cannot obtain the redress to which he has proven himself entitled. By focusing on Rivcom's supposed retaliatory motives rather than on whether its unlawful detainer suit presented any

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[20] The Ventura County Municipal Court concluded as a matter of law that Rivcom's "motive and dominant purpose for evicting [the tenants], and each of them, were not unlawful or improper." App. 194a.

genuine issues of material fact, the California Supreme Court improperly deprived Rivcom of its First Amendment right of access to the courts.

Acceptance of this case will permit the Supreme Court to review the right of access to state judicial remedies in a labor context similar to that of *Bill Johnson's* but without the competing federal-state interests present in that case. Rivcom's situation thus presents not merely an opportunity to correct the California Supreme Court's misstatement of *Bill Johnson's*, but also—and more importantly—an opportunity to clarify the limits within which a state may foreclose the constitutional right of access to a civil remedy in the interest of protecting labor rights.

B. The California Supreme Court's Order Conflicts With Federal Law And Is Invalid Under The Supremacy Clause Of The United States Constitution.

The California Supreme Court's decision, upholding the ALRB order, requires Rivcom to keep its labor housing open. Federal law prohibits the operation of such housing unless it complies with federal and state safety and health standards. The housing on Rancho Sespe, however, has been condemned by state officials as hazardous and unfit for human habitation. Compliance with the ALRB order thus requires Rivcom to operate a labor camp in violation of federal law. This conflict between federal and state law is untenable under the Supremacy Clause of the United States Constitution.

The Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA"), 29 U.S.C. §§ 1801-1872, became effective on January 14, 1983.[21] It requires that

[21] MSAWPA replaced the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), 7 U.S.C. §§ 2041-2053, which was repealed

"each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing." 29 U.S.C. § 1823(a). Compliance with applicable standards is to be certified by "a State or local health authority or other appropriate agency." *Id.* § 1823(b)(1). Persons who own or control such housing are forbidden to permit it to be occupied by any migrant agricultural worker "unless a copy of the certification of occupancy is posted at the site." *Id.* Violation of these provisions is punishable by criminal fines and imprisonment, as well as by civil penalties. *Id.* §§ 1851(a), 1853(a).

Even *before* Rivcom acquired its leasehold interest in Rancho Sespe, the ranch was out of compliance with state law. A permit to operate the labor camp, issued by the state Department of Housing and Community Development (HCD) had been cancelled prior to the sale of the ranch. Later, the housing was condemned by Ventura County following an administrative determination that the property was hazardous to health and safety because of defective gas piping and sewage disposal systems. Both HCD officials and federal inspectors from the Occupational Safety and Health Administration have informed Mr. Harris that the dwellings do not meet their respective agencies' standards. In addition, the county Department of Environmental Health has refused to issue a

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effective that same date. FLCRA required registered "farm labor contractors" who maintained housing for migrant workers to submit proof that such housing complied with federal and state health and safety standards. *See* 29 C.F.R. § 40.20(a)(2) (1983). Rivcom was required by the Department of Labor to register as a farm labor contractor under FLCRA.

permit to operate a domestic water system for the camp until changes are made in the ranch's reservoir system. In short, the ranch has long had serious and extensive health and safety problems. Given Rivcom's statutory right to abandon and raze the camp—a right that has been upheld by a California appellate court[22]—compliance with federal or state health and safety requirements is not a realistic possibility.

The California Supreme Court's decision thus has put Rivcom in a serious predicament. Bringing the labor camp into compliance with state and federal standards—so as to obtain the certification required by MSAWPA for migrant housing—is economically impracticable. Yet the court's order requires Rivcom to keep the camp open, despite the impossibility of meeting certification standards. In effect, the California Supreme Court has ordered Rivcom to violate federal law.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A state's laws violate this clause and are invalid when they "interfere with, or are contrary to, the laws of congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824).

This Court has not confined its Supremacy Clause analysis solely to state legislative actions; acts of the judiciary also come within its scope. Thus, in *Lee v. Florida*, 392 U.S. 378 (1968), the Court reversed the conviction of a criminal defendant at whose trial the state had

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[22] See page 12 *supra*.

introduced into evidence unauthorized tape recordings of conversations conducted over the defendant's home telephone. Although no state statute prohibited the making of such recordings, Section 605 of the Federal Communications Act of 1934 declared it illegal to intercept and divulge any communication without the sender's permission. *Id.* at 379. To condone the state's actions, the Court held, would breach the Supremacy Clause. "Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound . . . .' " *Id.* at 385-86; *accord Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980) (although a state "has great latitude in fashioning rights and remedies for its own courts, it may not do so in a manner which would frustrate the objectives of Congress").

The test of whether a state's action can withstand Supremacy Clause analysis is whether it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In the instant case, California's actions clearly do pose such an obstacle. MSAWPA, enacted in response to evidence that "migrant and seasonal agricultural workers remain . . . the most abused of all workers in the United States," H.R. Rep. No. 885, 97th Cong., 2d Sess. 2, *reprinted at* 1982 *U.S. Code Cong. & Ad. News* 4547, 4548, was intended to remedy the "deplorable conditions in which migrant workers are often housed" by preventing occupancy of housing that might "in any way endanger the health or safety of the migrant agricultural worker or his or her family." *Id.* at 17-18, *reprinted at* 1982 *U.S. Code Cong. & Ad. News* 4563-64. Occupancy of Rancho Sespe's

housing is a continuing frustration of the congressional purpose behind MSAWPA—and the judicial order sanctioning that occupancy makes the court "an accomplice in the willful transgression" of federal law. *Lee v. Florida*, 392 U.S. at 386.

MSAWPA is a new and important federal statute. It applies not only to California, but to all states where migrant agricultural labor is used. Many of those states have independent enactments designed to protect such workers, and conflicts similar to the one in this case are likely to recur.[23] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 23-1381 to 23-1395 (1983); Hawaii Rev. Stat. ch. 377 (1976 & Supp. 1983); Idaho Code §§ 22-4101 to 22-4113 (1972 & Supp. 1983); Kan. Stat. Ann. §§ 44-818 to 44-830 (1981 & Supp. 1982). A clear ruling by this Court at this time will provide guidance to both state and federal courts as they seek to ascertain and enforce Congress' directives.

For these reasons, review of the California Supreme Court's decision is both necessary and appropriate.

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[23] Indeed, it has been noted that employment-related housing for farm workers is commonly subject to "inconsistent regulation of the same site by several agencies," both federal and state. This, in turn, creates serious compliance problems in that "meeting the standards of one agency may necessarily mean violating those of another." Pedersen & Dahl, *Occupational Safety and Health Regulation and Agriculture*, 1981-1982 Agric. L.J. 169, 174-75.

CONCLUSION

For the foregoing reasons, Petitioner Rivcom Corporation respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. 24520

RIVCOM CORPORATION *et al.*,
Petitioners,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent;

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Real Party in Interest.

SUPREME COURT
FILED
OCT 17 1983
LAURENCE P. GILL, Clerk

Rivcom Corporation (Rivcom), its parent Riverbend Farms, Inc. (Riverbend), and Triple M. Farms, Inc. (Triple M) petition for review of a decision of the Agricultural Labor Relations Board (Board) that the first two companies (collectively the growers) committed acts prohibited by section 1153, subdivisions (a), (c), and (e) of the Agricultural Labor Relations Act of 1975 (ALRA or Act) (Lab. Code, § 1140 et seq.). The findings under subdivisions (a) and (c)[1] are that the growers, as

[1] Section 1153 provides:

"It shall be an unfair labor practice for an agricultural employer to do any of the following:

"(a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

* * *

new operators of a large citrus farm in Ventura County, sought to avoid unionization by replacing the resident union-affiliated employees of the farm's previous owner with nonunion workers, and by evicting the resident employees from their labor-camp housing. The Board also upheld allegations that the growers violated subdivision (e) by refusing to bargain in good faith with the United Farm Workers of America (UFW), the certified representative of the predecessor employees.[2] The remedy imposed includes broad cease-and-desist and bargaining orders, combined with reinstatement, backpay, and make-whole relief.

We must decide, among other things, what deference is due the Board when it infers from circumstantial evidence that refusal to hire a predecessor's workers was prompted by a prohibited antiunion motive. We conclude that substantial evidence on the whole record supports the Board's decision here. We also reject the petitioners' remaining contentions. Therefore, we enforce the Board's order.

1. Facts.

Rivcom Ranch, formerly known as Rancho Sespe, lies near Santa Paula in Ventura County. The property includes some 4,300 acres, about 1,500 of which are devoted to its principal crops, citrus and avocadoes. Between 1973 and January 1979 the ranch was owned by PIC Realty Company (PIC), a subsidiary of Prudential Insurance Co.

"(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization. . . ."

All statutory references are to the Labor Code unless otherwise indicated or apparent.

[2] Section 1153 subdivision (e) makes it an unfair labor practice "[t]o refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part."

National Property Management Systems, Inc. (NPMS) supervised farming operations under contract with PIC. NPMS employed a year-round agricultural workforce living in labor-camp housing on the premises. The resident employees numbered as many as 140. Most had worked on the ranch for a considerable period, some as long as 10 years. There was evidence that its recent operations had not been profitable.

On May 9, 1978, the UFW won a representation election among the ranch workers. The union was certified on May 17 as the bargaining representative of all agricultural employees of "Rancho Sespe."

In the same year, a group of investors began negotiations to buy the ranch. Newport Properties, Inc. (Newport) was organized for this purpose. The investors eventually decided to lease the ranch for farming purposes to Larry Harris, president and principal shareholder of Riverbend. That company operated as a packer and marketer of citrus for many Ventura County growers. Harris was interested in the ranch primarily as a source of crops for Riverbend's packing operation.

Harris testified he toured the property early in January 1979, saw the need for drastic operational changes, and decided that the current workers should not be rehired because they would resist change. He admitted he became aware "sometime in 1978" that the UFW had won an election among the ranch employees.

On January 16, 1979, PIC sold Rancho Sespe to Paraships Builders, which immediately conveyed it to Newport. Newport, in turn, leased the land to Rivcom, a wholly owned subsidiary of Riverbend. The annual rent was to be at least equal to Rivcom's "net profit" from farming operations, up to $1.675 million.

On the day of the sale, an NPMS official informed the Rancho Sespe employees that their jobs were terminated. Within the next two days, Rivcom served 30-day eviction notices on the

workers.[3] Rivcom quickly obtained nonunion agricultural employees from Triple M, a statewide labor supplier with which Riverbend had a longstanding relationship. The number of farmworkers hired was far fewer than that NPMS had employed. None of the former Rancho Sespe workers was considered for reemployment.

On January 18, Emilio Huerta, a UFW agent, telephoned Harris' lawyer, Thomas Campagne. Campagne told Harris that Huerta had demanded recognition of the union, reinstatement of all the displaced employees, withdrawal of the eviction notices, and immediate bargaining about operational changes and a permanent contract. On January 19, the UFW sent Rivcom a mailgram containing essentially the same demands; Rivcom simultaneously received in the mail a copy of unfair labor practice charges filed with the Board.

Harris testified he was confused about receiving demands and charges at the same time. He ordered Campagne to respond to Huerta. Campagne's letter, dated January 19, addressed the recognition issue only. It urged that the prior UFW certification was not binding on Rivcom, and that Rivcom's recognition of the union might violate subdivision (f) of section 1153.[4] No mention was made of the hiring and eviction matters.

On January 31, about 60 former Rancho Sespe employees walked together to the ranch office. Some carried signs saying

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[3] The "license agreement" between NPMS and its resident workers provided for vacation of the premises within 24 hours after termination of employment. The growers urge that the extension granted by the 30-day notices was intended to avert hardship and demonstrates their good will.

[4] Under section 1153, subdivision (f), it is an unfair labor practice for an employer "[t]o recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part."

"We want our jobs." A delegation went in and asked to speak to Harris. After a few minutes, a security guard told them Harris would talk to them outside. The group waited in the rain for about 30 minutes. A deputy sheriff, Juan Mendez, then requested that they leave the property. The group's leader, Jaime Zepeda, asked Mendez, who had experience in labor relations, to relay a message to Harris. After talking with Harris, Mendez told the workers Harris did not wish to speak with them, and they dispersed.[5]

On February 5, Harris received a letter from the UFW dated February 1. It recited that "[t]he former employees of . . . Rancho Sespe," including some 140 persons named on an attached list, "hereby apply for employment with Rivcom . . . ." The letter made no additional demands. It simply declared that, by making application, the employees "do not waive . . . seniority or other rights." A second unfair labor practice charge filed by the UFW was served on Rivcom the same day.

2. The Refusal to Hire.

The Board adopted the conclusion of the administrative law officer (ALO) that the growers violated subdivisions (a) and (c) of section 1153 when, in order to avoid unionization and collective bargaining, they replaced the UFW-affiliated former Rancho Sespe employees with nonunion workers. That determination is attacked on numerous grounds.

Subdivisions (a) and (c) correspond respectively to section 8(a)(1) and (3) of the National Labor Relations Act (NLRA). (29 U.S.C.A. § 158(a)(1), (3).) As our statute contemplates, we rely where appropriate on "applicable" NLRA precedent. (See § 1148; Highland Ranch v. Agricultural Labor Relations Bd.

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[5] Mendez testified that the situation was potentially volatile. According to Mendez, Harris seemed apprehensive and said the sheriff's department had told him it would be dangerous to confront the workers.

(1981) 29 Cal.3d 848, 855-856; Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 412-413.)

It is an unfair labor practice for an employer "[t]o interfere with, restrain, or coerce" employees in the exercise of their organizational rights (ALRA, § 1153, subd. (a); NLRA, § 8(a)(1)) or "[b]y discrimination in . . . hiring or tenure, . . . to . . . discourage membership in any labor organization." ALRA, § 1153, subd. (c); NLRA, § 8(a)(3).) While the owner of a business has broad power to restructure its operations and hire his own workers, he violates the Act if he discriminates against union applicants on the basis of antiunion animus. (Howard Johnson Co. v. Hotel Employees (1974) 417 U.S. 249, 261-262, and fn. 8; NLRB v. Burns Security Services (1972) 406 U.S. 272, 280-281, fn. 5, 287-288; Phelps Dodge Corp. v. Labor Board (1941) 313 U.S. 177, 185-186; N.L.R.B. v. Foodway of El Paso (5th Cir. 1974) 496 F.2d 117, 119-120.)

The growers do not dispute these settled principles. They argue, however, that the record here cannot support the charges.

At the outset, the growers invoke the general rule that an employer commits no unfair labor practice by rejecting offers to work which are absolutely conditioned on terms he need not accept. (See, e.g., Packing House and Indus. Services v. N.L.R.B. (8th Cir. 1978) 590 F.2d 688, 696; Sawyer Stores, Inc. (1971) 190 N.L.R.B. 651, 656.) They argue that the Rancho Sespe workers' attempts to apply through the UFW were improperly conditioned on demands for union recognition, collective bargaining, and "all-or-none" reinstatement of the displaced employees.

The Board concluded that the UFW reinstatement applications were not conditional, since any "demands" were nothing more than negotiating ploys. It was not clear, said the Board,

that every applicant would really refuse to work unless the growers agreed to the unwarranted terms.[6]

We need not tarry over the Board's reasoning. Deficient applications are no legal justification for a refusal to hire if proper, timely offers to work would also have been rebuffed. (*Packing House and Indus. Services, Inc.*, supra, 590 F.2d at pp. 695-696; Piasecki Aircraft Corporation v. N.L.R.B. (3d Cir. 1960) 280 F.2d 575, 585, cert. den. (1960) 364 U.S. 912; Macomb Block and Supply, Inc. (1976) 223 N.L.R.B. 1285, 1286, enforcement den. on other grounds (6th Cir. 1978) 570 F.2d 1304; see Kawano, Inc. (1979) 4 A.L.R.B. No. 104, pp. 4-5.)

The growers' defense to the charge of antiunion motive is founded on the premise that Harris had already decided before January 16 not to consider the predecessor's workers, based on his preference for familiar Triple M personnel and his view that new employees were needed to implement operational changes. (See discussion, *post.*) Indeed, Harris testified that on both January 18 and February 5, the dates on which the union "demands" were received, he had no positions available and no reasonable prospect of any in the foreseeable future. Hence, the "improper application" argument lacks merit.

The growers next claim the record fails to support a conclusion that the refusal to hire was impelled by an antiunion purpose. We cannot agree.

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[6] The ALO refused to admit in evidence the growers' exhibit G, a "declaration" by Attorney Campagne stating the substance of his January 18 telephone conversation with Huerta. The declaration suggests that Huerta took a particularly intransigent tone in voicing the union's terms. The growers challenge the ALO's ruling and offer the declaration for substantive consideration on appeal. However, they failed to raise the admissibility of the declaration in their formal exceptions and brief filed with the Board. Hence, they waived the point (see Butte View Farms v. Agricultural Labor Relations Bd. (1979) 95 Cal.App.3d 961, 971), and we do not consider exhibit G for any purpose.

Of course, we do not reweigh the evidence. If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so. (See Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 94; N.L.R.B. v. Holly Bra of California, Inc. (9th Cir. 1969) 405 F.2d 870, 872.) We will uphold the Board's decision if it is supported by substantial evidence on the whole record. (§ 1160.8; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 727; Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335, 343-346; see Universal Camera Corp. v. Labor Bd. (1951) 340 U.S. 474, 488.)

Here, as often happens, there was no direct or specific evidence that the growers' hiring policy for obtaining agricultural workers was wrongly motivated. No witness testified, for example, that Harris had vowed to avoid the UFW by any and all means. Rather, the Board inferred improper motive primarily because it did not believe Harris' alternative explanations of his conduct. Its decision must be sustained if its grounds for discrediting Harris were plausible.

As a rule, motive must be inferred from all the circumstances, and the Board's expertise entitles it to considerable deference in deciding that question. (E.g., Penasquitos Village, Inc. v. N.L.R.B. (9th Cir. 1977) 565 F.2d 1074, 1079; Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal.App.3d 826, 835-836.) The general counsel has the burden of establishing bad motive. Yet inferences arising in law and reason may require an employer to justify his suspicious acts.

For example, NLRB v. Great Dane Trailers (1967) 388 U.S. 26 established that some employer conduct is so "inherently destructive" of employee organizational rights as to constitute a prima facie violation which the employer must explain away. Conduct of this kind "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have

intended' and thus bears 'its own indicia of intent.' [Citation.]" (P. 33.)

In such cases, the Board may find an unfair labor practice "even if the employer introduces evidence that the conduct was motivated by business considerations. . . . [¶] . . .Thus, . . . once it has been proved that the employer has engaged in discriminatory conduct which could have adversely affected employee rights . . ., the burden is upon the employer to establish that he was motivated by legitimate objectives. . . ." (P. 34.) If his business justifications are not "legitimate and substantial," such conduct may constitute an unfair labor practice "without reference to intent." (NLRB v. Fleetwood Trailer Co. (1967) 389 U.S. 375, 380.)

Wholesale replacement of union with nonunion employees has a manifest and substantial adverse impact on organizational rights. (See *Phelps Dodge Corp.*, supra, 313 U.S. 177, 185.) Arguably, therefore, the *Great Dane* analysis applies; indeed, both the Board and the parties have proceeded on the assumption that it should. (See Columbus Janitor Service (1971) 191 N.L.R.B. 902, 910-911; see also Rushton & Mercier Woodworking Co. (1973) 203 N.L.R.B. 123, 125-126, enforced (1st Cir. 1974) 502 F.2d 1160, cert. den., 419 U.S. 996.)

Great Dane aside, common sense supports the Board's argument that it could infer bad motive from the lack of credibility in Harris' explanations. When an employer acquires an enterprise soon after a union has won election as bargaining representative, he is bound to know that under existing law he may, by hiring new employees, be able to avoid the bargaining obligations he would otherwise inherit. (See discussion, *post*.) He has full power to employ new workers for other reasons. (*Howard Johnson Co.*, supra, 417 U.S. 249, 261-262, and fn.8; *Burns Security Services*, supra, 406 U.S. 272, 280-281, fn. 5, 287-288.) But the Board need not ignore his obvious incentive, when faced with a recent certification, to use his hiring authority as a means of nipping union problems in the bud.

The antiunion temptation to take such a course is likely to be much greater than in the case of an individual discharge.

Therefore, when all the reasons a new employer has given for replacing the union workforce with nonunion employees are found unconvincing, and the circumstances otherwise permit, the Board may be entitled to conclude that the true motive is the prohibited one. (See *Foodway of El Paso*, supra, 496 F.2d 117, 119-120; Tri State Maintenance Corporation v. N.L.R.B. (D.C.Cir. 1968) 408 F.2d 171, 174; Shattuck Denn Mining Corp. v. N.L.R.B. (9th Cir. 1966) 362 F.2d 466, 470; Columbus Janitor Service, supra, 191 N.L.R.B. 902, 910-911.)

The growers raise no fundamental objection to these principles. They argue vigorously, however, that the Board had no grounds to reject Harris' "uncontradicted" statement of his legitimate business motives.

We recognize that the Board must accept "uncontradicted and unimpeached" testimony unless "there is some rational reason for disbelieving it." (*Martori Brothers*, supra, 29 Cal.3d 721, 728.) But an interested witness' declarations of his innocent purpose are difficult to rebut directly. The Board must assess their credibility in light of all the facts.[7]

The growers first rely on Harris' statement of his established preference for employees who had already worked for

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[7] The growers also object to the Board's failure to find that antiunion animus was a "but for" cause of Harris' refusal to hire any prior workers. (*Martori*, supra, at p. 730; see Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274, 287; Wright Line (1980) 251 N.L.R.B. 1083, 1089, enforced (1st Cir. 1981) 662 F.2d 899, cert. den. (1982) 455 U.S. 989.) The "but for" test, however, applies to so-called "dual motive" situations in which the Board finds that *both* innocent and improper purposes were involved. Here, the Board concluded that all the innocent motives advanced were pretexts. In effect, it determined that antiunion animus was the only true cause. (*But cf., Jackson v. Heller, The Irrelevance of the Wright Line Debate: Returning to the Realism of Erie Resistor in Unfair Labor Practice Cases* (1983) 77 Nw.U.L.Rev. 737, 757.)

him.[8] They point to several NLRB decisions suggesting that employers need not alter customary hiring practices when taking over new businesses, even if this means wholesale rejection of a predecessor's union workers. (E.g., Industrial Catering Company (1976) 224 N.L.R.B. 972, 978; Crotona Service Corp. (1972) 200 N.L.R.B. 738, 740-741; Southline System Services (1972) 198 N.L.R.B. 449, 452.)

The growers contend that a consistent preference for familiar workers over strangers dispels any *Great Dane*-style inference of antiunion animus. In each of the cases they cite, however, the NLRB simply credited employer assertions of good faith under all the circumstances.

For example, in *Industrial Catering*, the NLRB noted the several months' time lapse between discontinuance of cafeteria services and their resumption under a new concessioner. It also found convincing the new employer's argument that his services differed substantially from the predecessor's and that he employed rigid and standardized methods in all his cafeteria operations. (224 N.L.R.B. at p. 978.)

Evidence that an employer treats union workers just as he has treated nonunion workers in the past weighs toward a finding that there was no antiunion discrimination or animus. (E.g., Pellegrini Bros. Wines, Inc. (1979) 239 N.L.R.B. 1220, 1226.) Yet here the Board concluded from all the evidence that an innocent preference for familiar workers was not a true reason for wholesale rejection of the NPMS employees. That determination must stand if substantially supported. It must

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[8] On appeal, the growers have cited statutes and cases supporting an employer's right to follow a "bona fide seniority system" which does not manifest discriminatory intent. (See Civil Rights Act of 1964, tit. VII, § 703(h), 42 U.S.C.A. § 2000e-2(h); Franks v. Bowman Transportation Co. (1976) 424 U.S. 747, 757.) No such "seniority system" argument was raised before the Board. We reject it in any event; there was no evidence of adherence to a system granting vested seniority rights.

be evaluated in light of all the justifications the growers have advanced for preferring Triple M crews.

According to Harris, his observations at the ranch convinced him that quick and drastic changes were necessary to turn it into a profitable farm. He had a longstanding relationship with Triple M through Riverbend, and it provided a ready pool of workers familiar with the methods he intended to install.

The growers also assert that here, as in his prior takeovers, Harris adhered to the "management principle" that a new operator should not hire his predecessor's employees, since they are likely to resist change. Moreover, they say, Harris wished to reward Triple M employees for their past loyalty; he had promised one crew that its members would have the first of any new work in Ventura County.

The Board saw numerous reasons for distrusting Harris' statement of his motives. First, it noted that evidence of Harris' past practice in taking over businesses was scarce, and it concerned much different entities.[9] Hence, there was little basis to conclude that he was acting consistently by preferring his own workers in this case.

Next, the Board found no logic or prudence in Harris' untested assumption that the Triple M employees were superior for his purposes. The NPMS workers were on the premises, readily available. They had long experience with the ranch's operation, while the imported Triple M personnel had none. Harris himself had never farmed such large acreage. Yet he never inquired whether any of the NPMS employees had skills he could use,[10] and he actively avoided their repeated attempts to offer themselves for work.

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[9] Harris had previously taken over an 80-employee citrus packing house and three smaller citrus farms with a total of "perhaps ten employees."

[10] Harris did hire two nonunion former NPMS managers as consultants.

The Board also concluded, on conflicting evidence, that the operational changes Harris planned were not substantial. This, it suggested, undermined his asserted belief that a complete personnel turnover was necessary. Harris testified that he wished to reduce the labor force, switch from "furrow" to "drip" irrigation, change from cultivation to herbicides as a means of weed control, substitute piecework compensation for hourly wages in harvesting, and alter fruit-picking methods. However, the Board credited evidence that the irrigation and weed-control changes were already in progress, using the NPMS workers, when Harris took over.

Moreover, said the Board, Harris could not have evaluated the Triple M employees' skills in these preharvest areas; Riverbend, as a packer, provided harvesting and pruning services for its grower customers but had not been involved in other cultivation matters.

The growers made much of Rancho Sespe's outdated pruning methods, but the Board concluded that the changes involved no extensive retraining. It is conceded that some of the workers hired had no familiarity with Harris' pruning techniques.[11]

The Board noted that, despite Harris' claims of loyalty to the Triple M employees, and of their special skills in his techniques, none had worked for Riverbend more than two years. Many were seasonal only, and some had less than three months' experience with Harris.

Under these circumstances, the Board also questioned Harris' reliance on a "management principle" of avoiding the predecessor's experienced workers. In the Board's view, blind adherence to such a principle was not a prudent alternative to

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[11] This, of course, suggests Harris really had no plan to confine his hiring to workers versed in his methods. The same can be said for his testimony that, after a 30-minute refresher course in pruning, his veteran workers could "help along" their inexperienced compatriots.

ascertaining the actual qualifications of a seasoned, already-present labor pool.[12]

The growers argue that asserted motives cannot be rejected simply because they are unreasonable, since the employer can refuse to hire for any cause, good or bad, other than antiunion animus. (See, e.g., N.L.R.B. v. Joseph (9th Cir. 1979) 605 F.2d 466, 468; National Labor Relations Board v. McGahey (5th Cir. 1956) 233 F.2d 406, 412.) However, common sense suggests that the less logical a motive for business conduct, the more likely that it did not actually exist.[13] We think the Board may decide, within reason, whether an employer's asserted motives appear so trivial or illogical that they are improbable.[14]

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[12] Rejecting a similar contention in Columbus Janitor Service, supra, 191 N.L.R.B. 902, the NLRB said: "[t]he apocryphal character of such claim is self-evident for the Respondent did not interview a single Allied employee to ascertain whether he or she possessed bad habits or whether he or she would adapt to the Respondent's work methods, although it knew Allied employees were available for employment." (P. 911.)

[13] The ALO rejected the "management principle" motive as a matter of law, concluding that it would always justify preferring new workers over a predecessor's union employees, to the detriment of labor policy. The Board did not adopt the ALO's analysis on this point. However, it noted that "such a management practice may conflict with the Act's policy of encouraging stable labor relations, and will frequently result in the refusal to hire former employees who are represented by a union."

[14] The growers note the statements of two other farm operators that they would always prefer familiar workers in taking over a new farm, regardless of the quality of the predecessor employees. By rejecting their "management principle" defense as unreasonable, the growers say, the Board improperly disregarded this "uncontradicted expert testimony." However, the Board has considerable power in this nontechnical area to apply its experienced common sense against the formal evidence. (Cf., Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 139-141.)

The Board, like the ALO, was also unpersuaded by Harris' assertions that he had assured a Triple M crew first chance at any new farm work in the county. This vaguely stated promise, the Board reasoned, could not have been a serious factor in Harris' plans, since it was made in mid-1978, long before Harris had any idea he would be allowed to pick and pack the ranch's fruit. Only later did it become clear that he would have to take over farming operations in order to obtain the crops.

Moreover, Harris' testimony was confused as to places, dates, and number and names of Triple M employees to whom he spoke, undermining his general credibility and indicating a lack of warmth and loyalty toward the workers. Indeed, Harris did not know if any of the workers he addressed had ever worked for Riverbend.[15] By the time of the hearing (April 1979) he had obtained from Triple M many more employees than were in the "promised" group, including 13 temporary people who had never worked for him before.[16] Again, while contrary inferences were certainly possible, the Board's analysis is supportable.

Harris argued that speedy changes were needed to enable him to meet the "burdensome" rent obligations. The Board found, however, that few changes had been made in the first three months of operation. The growers' rebuttal that little

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[15] The growers point out that Harris did remember several names and suggest that passage of time between the promise and the hearing caused normal memory lapses. But the Board could infer that Harris was unlikely to forget the details of a commitment so important to him. Indeed, it would be necessary to remember the identities of the promised workers so they would be the first accommodated.

[16] Petitioners say these were temporary frost-protection workers, needed until Triple M employees already hired returned from vacation. But, as the Board notes, favoring even these temporary workers over the former Rancho Sespe personnel suggests that Harris was more interested in excluding the latter than in preferring people with whom he had a prior relationship.

could be done in the winter months actually contradicts their assertion that the need for speed was a factor in Harris' determination.

Finally, as the Board noted, the reasons Harris gave for his actions were often irreconcilable. For example, he explained his uncooperative attitude toward the UFW as hostility and "confusion" about its harsh and rigid demands. He testified that individual inquiries from the NPMS workers were never received, hinting that they would have been considered. Yet he also maintained that his employment policies arose from a prior decision to follow the absolute "management principle" against hiring a predecessor's workforce. He conceded, indeed insisted, that by the time the UFW's first communication was received, all hiring had been done, and no positions were or would be available.

In sum, the Board found Harris' statement of his business justifications to be "superficial, unfounded, and contradictory" under all the circumstances. This, in the Board's view, left "only the explanation that [the growers] sought to avoid hiring employees who had already chosen the UFW as their bargaining representative."

On the whole record, we see no basis to disturb the Board's conclusion. The evidence supports its finding that Harris knew of the UFW election victory when he agreed to farm the ranch. Upon taking it over, he moved swiftly to evict the unionized employees. He provided them no opportunity to apply for work, never inquired about their qualifications, and steadfastly determined that none would be rehired, though they represented a labor pool with extensive experience in the ranch's operations. While hastily assembling his own complement of workers, he avoided the former employees' efforts, both direct and through their union, to plead their case for reinstatement. His response to the union's complaints was minimal, uncooperative, and evasive. His replacement personnel, all newcomers to the ranch, had no union affiliation. On substantial evidence, the Board concluded that the "innocent"

business reasons advanced for these policies were inconsistent and incredible.

Such facts may not compel the inference that an employer acted for antiunion reasons, but they amply support it. (Compare, e.g., Kallmann v. N.L.R.B. (9th Cir. 1981) 640 F.2d 1094, 1099-1100; N.L.R.B. v. Houston Distribution Serv., Inc. (5th Cir. 1978) 573 F.2d 260, 264, cert. den., 439 U.S. 1047; *Foodway of El Paso*, supra, 496 F.2d 117, 119-120; N.L.R.B. v. New England Tank Industries, Inc. (1st Cir. 1962) 302 F.2d 273, 276, cert. den., 371 U.S. 875; *Piasecki Aircraft Corporation*, supra, 280 F.2d 575, 576-585.) Accordingly, the Board's determination must be upheld.

3. Evictions.

The Board found that eviction of the Rancho Sespe workers from the labor camp was a separate violation of section 1153, subdivisions (a) and (c). When an employee is evicted from company housing following a discriminatory discharge (or refusal to hire), it may be proper to infer that the eviction was also discriminatory in purpose. (E.g., Filice Estate Vineyards (1978) 4 A.L.R.B. No. 81, p. 2; W. T. Carter and Brother (1950) 90 N.L.R.B. 2020, 2025.)

The growers introduced evidence that Harris considered maintenance of labor housing unduly expensive, wanted the land for agricultural use, and believed it best to encourage workers to maintain their own homes. There was, however, conflicting evidence on the virtues of resident labor. In any event, the Board reasoned that none of Harris' asserted reasons justified the haste with which the eviction notices were served. While conflicting inferences are possible, we see no reason to disturb its conclusions.

4. Refusal to Bargain.

The Board found that the growers had violated section 1153, subdivision (e), by refusing to recognize the UFW and take up the bargaining obligations of NPMS. A new owner, of course,

need not recognize the certified bargaining representative of his predecessor's employees unless he is a "successor employer." (See, e.g., *Burns Security Services*, supra, 406 U.S. 272, 278-279.)[17]

The growers note that continuity of the work force is an essential element of successorship. Since Harris hired no prior employees, they urge, they cannot be successors. But a new employer cannot avoid successorship status by a discriminatory refusal to hire the predecessor's workers. Where such conduct has occurred, continuity of the workforce will be presumed. (E.g., *Foodway of El Paso*, supra, 496 F.2d 117, 120; K.B. & J. Young's Super Markets, Inc. v. N.L.R.B. (9th Cir. 1967) 377 F.2d 463, 466, cert. den., 389 U.S. 841.)

Nevertheless, the growers say, there is need for separate proof that, absent the discriminatory motive, the new employer would have hired enough of the predecessor's employees to establish continuity.[18] We find no support for such a claim. In any event, we think any necessary proof is implicit in evidence that the new employer acted to avoid union obligations.

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[17] The growers' argument that ALRA sections 1153, subdivision (f) (employer may only bargain with "certified" representative) and 1156 ("certified" representative must be chosen by election in the "bargaining unit") abrogate the successorship doctrine was rejected in San Clemente Ranch, Ltd. v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 874, 885, footnote 12. (See also *Highland Ranch*, supra, 29 Cal.3d 848, 861-862.) The contention has been abandoned.

[18] Federal precedent requires for "workforce continuity" that a majority of the new owner's employees worked for the predecessor. (*Burns Security Services*, supra, 406 U.S. 272, 281; Saks & Co. v. N.L.R.B. (2d Cir. 1980) 634 F.2d 681, 685.) In *San Clemente Ranch*, supra, 29 Cal.3d 847, we held that the fluctuating nature of agricultural employment requires a more flexible approach to workforce continuity. (P. 891.) The growers suggest the federal rule should apply here since both the former and current employees are permanent. The issue is moot, however, in discriminatory-refusal-to-hire cases.

The growers suggest that, even with continuity of labor force, they were not a successor, since they substantially altered working conditions, equipment, methods of farming, and number of permanent employees at the ranch. The Board found the "essential nature of the business" unchanged; despite the institution of new practices, it continued to grow and harvest substantially the same crops at the same location.

Successorship analysis seeks to determine whether, after a transfer of business control, the previously certified bargaining unit remains appropriate in light of employee needs and expectations. (See *Burns Security Services*, supra, 406 U.S. 272, 280.) The test, at bottom, is whether it is proper to assume the previous unit still exists and still is represented by the union. (N.L.R.B. v. Hudson River Aggregates (2d Cir. 1981) 639 F.2d 865, 869; N.L.R.B. v. Middleboro Fire Apparatus, Inc. (1st Cir. 1978) 590 F.2d 4, 8.)

In this context, continuity of supervisory personnel, use of the same machinery and equipment, and retention of individual employee functions are important but not dispositive. Continuity of the unit's workforce, presumed in this case, is the most crucial factor. (See *Hudson River*, supra, 639 F.2d 865, 869; Service, Hospital, etc. v. Cleveland Tower Hotel (6th Cir. 1979) 606 F.2d 684, 687; Intern. U. of Elec., Radio & Mach. Wkrs. v. N.L.R.B. (D.C.Cir. 1979) 604 F.2d 689, 694; *San Clemente Ranch*, supra, 29 Cal.3d at p. 891.) The Board did not err in finding the growers to be successors.

5. Riverbend's Opportunity to be Heard.

At a prehearing conference, the ALO granted Riverbend's motion to be dismissed as a respondent. Riverbend argues that it was unfairly surprised and denied due process when, without notice on the last day of hearing, the general counsel was allowed to amend the complaint to reinclude Riverbend as a "joint employer" subject to any remedial order. Riverbend urges the case should be remanded for a full hearing on its joint-employer status. We disagree.

The original and first amended complaints had named Riverbend as a respondent, asserting that Rivcom was its wholly owned subsidiary and agent. They also had alleged that joint-employer status existed between Newport and Riverbend, and between Newport and Rivcom. However, it was never recited that Riverbend and Rivcom were directly related as joint employers.

When the ALO granted Riverbend's motion to dismiss, he ordered Riverbend's name removed from the complaint's caption and from its prayer for relief. The original joint-employer allegations remained in the body of the pleading.

We reject the Board's contention that these remaining boilerplate allegations were enough to place Riverbend on notice after its dismissal that it was potentially liable as a joint employer. The clear purpose of the ALO's prehearing order was to drop Riverbend from the complaint on grounds the allegations against it were not sufficient to state a claim (see discussion, *post*). On the basis of the pleadings alone, Riverbend was entitled to believe it had been dismissed from the proceeding.

We are concerned about the timing of the later amendment. However, we conclude that it did not deny Riverbend due process. Harris is president of both Rivcom and Riverbend, and he was present throughout the proceedings. So were one or more members of Campagne's law firm, which acted on Riverbend's behalf throughout.

On the third day of the hearing, Harris was called as an adverse witness by the general counsel and was examined at length on the relationship between Riverbend, Rivcom, and Triple M. After a recess, the ALO broached the question of Riverbend's status. He advised Campagne that he had dismissed Riverbend because allegations of a parent-subsidiary relationship, standing alone, were insufficient to saddle that company with responsibility for Rivcom's unfair practices. However, he said, "I'd like you to on the record be aware that in my mind testimony has opened up serious question as to

whether Riverbend . . . may also be an employer, an agricultural employer under the Act." Campagne responded by reiterating his argument that Triple M, not Riverbend, employed the workers used in Rivcom's farming operation.

On the last day of the hearing, after both sides had rested, the Board's counsel sought several amendments to conform to proof, including a new allegation that Riverbend and Rivcom, by virtue of their close operational and labor relationship, were joint employers of the Rivcom workers. Campagne argued on Riverbend's behalf that the evidence failed to show joint-employer status, but he did not complain that amendment of the complaint *in this respect* constituted prejudicial surprise to Riverbend. Contrary to Riverbend's claim on appeal, he never asked that the hearing be continued or reopened so Riverbend could present further evidence on the joint-employer issue.[19]

Indeed, the due process-surprise argument was not raised in the growers' joint posthearing brief to the ALO. Though it was included among the 238 formal exceptions presented to the Board, the question was not briefed at that level. Nor was it asserted in the Court of Appeal until oral argument, at which time that court requested supplemental briefing.

Riverbend still claims it would have litigated the joint-employer issue more fully had it known it remained potentially liable. Yet it has never suggested any specific, material new evidence it would have adduced had the hearing been continued or reopened.

Amendments to conform to proof are liberally allowed unless they prejudice the opposing party. (Code Civ. Proc., § 469.) Since no prejudice is shown from the amendment here, it was well within the Board's discretion to allow the amendment and,

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[19] Campagne did ask the ALO for a continuance so he could produce additional evidence on the proposed make-whole remedy. (See discussion *post*.) But he never mentioned the *joint-employer* issue as one he needed more time to meet.

upon finding joint-employer status, to extend its remedial order to Riverbend. (Royal Typewriter Co. v. N.L.R.B. (8th Cir. 1976) 533 F.2d 1030, 1043-1044; see also N.L.R.B. v. Jordan Bus Co. (10th Cir. 1967) 380 F.2d 219, 222-223; Hillside Manor Health Related Facility (1981) 257 N.L.R.B. 981, 984-985, enforced (1st Cir. 1982) 697 F.2d 294.)

6. Employer Status.

The growers contend that there is no substantial evidence that either is the statutory employer of the ranch workers. They first urge that Triple M is "the" true employer. Labor contractors, of course, are excluded from employer status by the ALRA. (§ 1140.4, subd. (c); see discussion, *post.*). The growers assert, however, that Triple M functions as a "custom harvester" and may be deemed an employer.[20]

The Board found the contrary. It acknowledged that Triple M had some characteristics of a custom harvester; it provided equipment and hauling services, set wages, and apparently had hiring and firing authority.[21] However, the Board concluded on conflicting evidence that Harris had primary control over day-to-day farming operations. Most significantly, it determined that Rivcom and Riverbend, rather than Triple M, had "the substantial long-term interest in the ongoing agricultural operation" which made it appropriate to fix employer

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[20] Typically, a custom harvester not only contracts to furnish labor, but assumes more complete responsibility for harvesting services, including provision of equipment and hauling. His compensation is usually an overall contract rate not directly pegged to labor costs. He generally retains control over hiring, firing, and details of work management. (See Jack Stowells, Jr. (1977) 3 A.L.R.B. No. 93, pp. 2-3; Napa Valley Vineyards Co. (1977) 3 A.L.R.B. No. 22, pp. 9-11; Kotchevar Brothers (1976) 2 A.L.R.B. No. 45, pp. 6-7.)

[21] The Board found "no evidence" that Harris had power to hire, fire, or discipline. Actually, though Harris denied it, his resident ranch supervisor testified that Harris and Benny Martinez, owner of Triple M, shared that authority.

responsibilities on them. (See Corona College Heights Orange and Lemon Association (1979) 5 A.L.R.B. No. 15, pp. 11-12.)

We agree. The ALRA expressly excludes both a "farm labor contractor" and "any [other] person supplying agricultural workers to an employer" from the otherwise expansive definition of "agricultural employers" subject to the Act. A farm operator who "engages" the labor supplier is "deemed the [statutory] employer for all purposes" of the statute. (§ 1140.4, subd. (c).)

In these provisions, the ALRA's drafters directly addressed the widespread practice of obtaining field workers from intermediate suppliers who retain ostensible control over hiring, firing, wages, and working conditions. The Act sought to bypass that intermediate employment relationship and to "establish [an] 'industrial' bargaining unit scheme, with collective bargaining directly between growers and unions." (Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 323.) It also confirmed farm operators' direct responsibility for unlawful interference with employees' organizational rights. (Id., at p. 326.)

The Board developed the "custom harvester" distinction in response to arguments by certain labor suppliers that they were entirely excluded from statutory responsibility as mere labor contractors. No decision holds, however, that a custom harvester is the *sole* employer of any workers it furnishes. Any such result would undermine the statutory goal of fixing labor relations responsibility directly on farm operators. Thus, any assumption that Triple M acted as a custom harvester at Rivcom Ranch, and was therefore an employer of the workers there, does not preclude a finding that Rivcom and Riverbend, the ranch's operators, were *also* employers of those workers for purposes of the Act. The Board has reached the correct conclusion.

Riverbend claims there is no basis to conclude it is a "joint employer" with Rivcom. There was ample evidence, however, that for labor-relations purposes, Rivcom and Riverbend oper-

ated as a single enterprise. (N.L.R.B. v. Triumph Curing Ctr. (9th Cir. 1978) 571 F.2d 462, 468; Abatti Farms, Inc. (1977) 3 A.L.R.B. No. 83 (ALO Dec., pp. 10-18).) Harris is principal owner of Riverbend, which owns Rivcom. For the most part, the ranch serves as the integrated farming arm of Riverbend's marketing operation; Rivcom cultivates citrus which Riverbend harvests, hauls, packs, sells, and ships. Harris makes the day-to-day management decisions for both entities.[22] He helped select, and he largely directs, the Triple M workers used by both Rivcom and Riverbend. There was evidence that Triple M workers have been transferred back and forth to both Rivcom and Riverbend payrolls as needed.

Riverbend's (and Rivcom's) lack of control over wages and hours of the Triple M workers is not fatal to a finding of employer status under the ALRB. That contract labor suppliers have traditionally retained those functions in California agriculture does not insulate the growers who engage them. (*Abatti Farms, Inc.*, supra, 3 A.L.R.B. No. 83 (ALO Dec., pp. 10-18; see *Vista Verde Farms*, supra, 29 Cal.3d 307, 323.) The Board's finding of joint-employer status is upheld.[23]

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[22] Riverbend says its relationship with Rivcom is no different from its tie to other "outside growers" for whom it also provides harvesting, hauling, and packing services. That ignores the common ownership and management of the two companies, and the evidence that Rivcom was principally intended as a "captive grower" of Riverbend, an assured source of fruit.

[23] The growers' opening brief on appeal argued that the case must be remanded since the Board failed to determine the appropriate bargaining unit after the change of ownership. (See § 1156.2; cf., Peter Kiewit Sons' Co. (1977) 231 N.L.R.B. 76, 78.) The Board's response urged that this, as well as several other contentions, had been waived because they were not fairly raised in the filed exceptions to the ALO's decision. (See *Butte View Farms*, supra, 95 Cal.App.3d 961, 971.)

The reply brief submitted by the growers denied waiver as to the other challenged arguments but did not mention this one. Our own review of the filed exceptions persuades us the issue was not pre-

7. Triple M's Interest in the Remedial Order.

The remedial order directs Rivcom and Riverbend to replace the employees now working at Rivcom Ranch with UFW workers displaced by the discriminatory refusal to hire. Triple M was not a party before the Board. In its separate petition for review (§ 1160.8), Triple M argues that it is directly affected by the reinstatement requirement, since it is the contractual source of the current workers who are subject to replacement. Hence, Triple M suggests, it was an indispensable party; without its participation, the Board lacked jurisdiction to make a reinstatement order. The contention lacks merit.

Triple M cites NLRA precedent which suggests that the Board may not interfere with contractual relations between a party and a nonparty unless the contract arises directly from an unfair labor practice and is void as a matter of statutory policy. (Compare, e.g., National Licorice Co. v. Labor Board (1940) 309 U.S. 350, 363-366, with Edison Co. v. Labor Board (1938) 305 U.S. 197, 231-239.) Recent NLRB decisions indicate the Board's reluctance to order abandonment of an employer's current labor-supply contract and reinstitution of another previously terminated, unless both old and new contractors have appeared and argued. (Compare Hillside Manor Health Related Facility, supra, 257 N.L.R.B. 981, 984-985, with Mobil Oil Corp. (1975) 219 N.L.R.B. 511, 512, enforcement denied on other grounds, Alaska Roughnecks & Drillers Ass'n v. N.L.R.B. (9th Cir. 1977) 555 F.2d 732, cert. den. (1978) 434 U.S. 1069.)

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served at the administrative level and is therefore waived. We assume it has been abandoned.

In any event, a determination of successorship includes an implicit finding that the previous bargaining unit remains appropriate. The Board accepted the ALO's decision to substitute Rivcom/Riverbend for NPMS on the prior certification order covering the ranch. There is no merit to petitioners' argument that the appropriate unit was not determined.

As noted, however, our farm labor law expressly discounts the widespread use of labor contractors by California growers. It makes the latter the "employers" for "all [labor relations] purposes" of agricultural workers supplied them by the former. (§ 1140.4, subd. (c), supra; see *Vista Verde Farms*, supra, 29 Cal.3d 307, 323-324.)

Any of the ALRB's remedial powers, including the power to order direct bargaining between grower and union, are likely to affect intermediate relationships between growers and contractors, and between contractors and workers. If the contractors were indispensable parties in every such case, the Board's power to fashion the remedies contemplated by the Act would suffer grievous harm.

It follows that a contractor's interests should not thwart the Board's enforcement of labor policy against the grower, whom the ALRA recognizes as the true employer. (*Cf.*, *National Licorice Co.*, supra, 309 U.S. at pp. 362-366.) Accordingly, the general counsel's failure to include the contractor as a party does not necessarily deprive the Board of jurisdiction to impose a remedy which may affect the contractor's relationship with both grower and workers.

Of course, the contractor may seek to intervene (§ 1160.2) and denial of intervention might sometimes be an abuse of discretion. Triple M, however, did not seek to participate in the proceedings below,[24] and it makes no serious showing of the

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[24] Triple M makes the startling assertion that it had no actual notice of the hearing before the ALO. It has a long, close association with Harris, Riverbend, and Rivcom, and has always been the source of the challenged workforce at Rivcom Ranch. Its relationship to Rivcom and Riverbend, and the status of the employees on its payroll, were central issues. Juan Batista, Triple M's crew leader at the ranch, testified at the hearing. We are not persuaded by counsel's assertion at oral argument that because Benny Martinez, Triple M's owner, was absent from the state during the hearing, Triple M had no actual knowledge of the proceedings.

interests it deems prejudiced. We conclude that the failure to include Triple M as a party before the Board does not invalidate the hiring order.

8. Remedies.

The Board's remedial order includes a broad cease-and-desist provision, as well as awards of reinstatement, backpay, and "make-whole" reparations for the growers' refusal to bargain with the union. Among other things, the Board ordered the growers to negotiate with the UFW and directed them not to discourage union membership by "attempting to evict, or evicting" the NPMS workers from housing "provided them as a condition of their employment by NPMS."[25]

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[25] We do not interpret the Board's order as an absolute command to maintain the labor camp permanently. The amended complaint charged and the Board found, among other things, that petitioners had used the eviction notices *as a form of antiunion discrimination* (§ 1153, subds. (a), (c)). The cease-and-desist order is directed only at evictions in furtherance of the antiunion policy. The Board also directed petitioners to bargain in good faith with the UFW. Thus, while petitioners may not unilaterally alter the "conditions of employment" by closing the camp, they may, of course, bargain about the future of employee housing on the ranch.

Rivcom cites a recent United States Supreme Court case, Bill Johnson's Restaurants, Inc. v. NLRB (May 31, 1983) ___ U.S. ___ [51 U.S.L. Week 4636], for the proposition that the Board may not prohibit "retaliatory" unlawful detainer actions. *Bill Johnson's* holds that when an employer's suit is *well-founded* and asserts rights *not preempted* by the labor laws, it may not be enjoined as an unfair labor practice *solely* on the ground that its *motive* is to retaliate against protected activity. (Pp. 4638-4639, and fn. 5.) However, labor statutes and regulations limit an employer's substantive rights under general law, including his right to exclude others from his property. (See, e.g., S. P. Growers Assn. v. Rodriguez (1976) 17 Cal.3d 719, 726-728; Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal.3d 392, 419-421.) And where a dispute concerns activities arguably protected or prohibited by the labor relations statute, the

The growers raise several objections. They first contend that the backpay award is overbroad, since it extends beyond actual wages lost to "expenses" and interest. But award of the costs of seeking or holding interim employment, and of interest, is a well-established NLRB practice. (Southern Household Products (1973) 203 N.L.R.B. 881, 883; Isis Plumbing & Heating Co. (1962) 138 N.L.R.B. 716, 719-720, enforcement den. on other grounds (9th Cir. 1963) 322 F.2d 913.)

Citing J.R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, the growers next urge that the Board erred by ordering them to make the NPMS employees whole for imputed bargaining losses (see *Highland Ranch*, supra, 29 Cal.3d 848, 866, fn. 7), since there was no finding that their refusal to bargain was in bad faith.

Our statute, unlike the NLRA, expressly empowers the Board to order the make-whole remedy for an employer's bad-faith refusal to bargain. (§ 1160.3.) However, this court held in *J.R. Norton* that the remedy may not be used when the employer commits a "technical" refusal to bargain as the only means to obtain judicial review of a colorable, good-faith challenge to union certification. If a sincere but unsuccessful chal-

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Board, not the courts, has primary jurisdiction. (See San Diego Unions v. Garmon (1959) 359 U.S. 236, 244-245; Vargas v. Municipal Court (1978) 22 Cal.3d 902, 910-913.) An employer has no right to discharge his resident workers, then commence eviction procedures, when his purpose is to combat or punish activities protected by the ALRA. (*Vargas*, supra, at p. 914; *S. P. Growers*, supra, at p. 725; see Code Civ. Proc., § 1161, subd. 1.) As a matter of law, retaliatory suits of that kind have no "reasonable basis" (compare *Bill Johnson's*, supra), and their use is an unfair practice the Board may enjoin. Moreover, the Board may obviously prohibit an employer's efforts to evict employees from housing provided as a "condition of employment" without first bargaining about the change with the employees' certified bargaining representative. (§§ 1153, subd. (e), 1155.2, subd. (a), supra.)

lenge exposed the employer to liability for all gains prompt bargaining might have produced, said the court, meritorious challenges, which serve the Act's purposes, would be deterred. (26 Cal.3d at pp. 27-37.)

Here, the Board found on substantial evidence that the growers attempted to evade the bargaining duties of a successor by adopting an illegal tactic—purposeful discrimination in hiring on the basis of union affiliation. In other words, they acted in bad faith in creating their claim of lack of successorship. No purpose of the ALRA would be served by insulating them from responsibility for the losses caused by their unlawful failure to bargain. No. *J.R. Norton* remand is necessary.[26]

The growers also urge that the reinstatement, backpay, make-whole, and no-eviction orders should not extend to all the former NPMS employees. Since the record establishes the ranch's reduced labor needs, they argue, we must assume many of the NPMS workers would not have been rehired in any event. (See, e.g., Castleman & Bates, Inc. (1977) 228 N.L.R.B. 1504, 1507-1508; Rogers Furniture Sales, Inc. (1974) 213 N.L.R.B. 834, 835-836.)[27]

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[26] The growers cite *San Clemente Ranch*, supra, for the proposition that *J. R. Norton* applies to successorship cases as well as those involving certification. (See 29 Cal.3d 874, 883, fn. 9.) But this case, unlike *San Clemente Ranch*, involves charges and findings that the growers used unlawful means to avoid successorship status. That establishes the necessary element of bad faith.

[27] In a "request for judicial notice" filed well after oral argument in this court, Rivcom alerts us to a February 1982 case, N.L.R.B. v. Sure-Tan, Inc. (7th Cir.) 672 F.2d 592, rehearing denied, 677 F.2d 584, which held that a reinstatement order applied to illegal aliens granted "voluntary departure" from the United States (see 8 U.S.C.A. § 1254(e)) only if their subsequent return and attempt to work is lawful under the immigration statutes. *Sure-Tan* also ruled that such departed aliens were entitled to backpay only for the period they would have remained employed and undetected by the INS

The Board recognized that Rivcom's needs might not accommodate all the former NPMS workers. It directed that those who could not be reinstated immediately be placed on a nondiscriminatory preferential-hiring list approved by the regional director. It then fashioned an order compensating losses "sustained by" the employees "as the result" of the refusal to bargain and "suffered" by "each of the employees . . . as a result of Respondents' unlawful refusal to hire them, . . ."

Under the circumstances, we construe the order as self-limited to losses *directly* arising *from the unlawful conduct.* That interpretation excludes those former employees who would not have been rehired even under a legitimate hiring policy. The identities of the excluded workers may be determined at a subsequent compliance hearing. (Kawano, Inc., supra, 4 A.L.R.B. No. 104, p. 18.)[28] We caution, however, that

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absent the employer's discriminatory conduct; six months, said the court, was a "reasonable assumption." (P. 606.)

Rivcom now claims that the ALO improperly cut off its attempt to inquire about the alien status of an NPMS employee who testified for the Board. Noting that certiorari has been granted in *Sure-Tan* ((March 7, 1983) ___ U.S. ___ [51 U.S.L.Week 3649]), Rivcom urges us to postpone our decision in this long-pending matter until the United States Supreme Court resolves the illegal-alien issue. We decline to do so. Petitioners never pursued their objection beyond the ALO hearing. They did not raise it before the Board, and they failed to call *Sure-Tan* to the Court of Appeal's attention in the eight subsequent months this case remained pending there. They neglected to mention it to us until July 1983, a year and a half after the Seventh Circuit's opinion was filed. Under the circumstances, petitioners have waived any claim based on illegal alienage.

[28] The growers argue that the NPMS payroll records introduced to establish the identities of the displaced workers do not meet the "business record" requirements of Evidence Code sections 1271, 1561, and 1562. They suggest that the affidavit of NPMS' custodian of records contained insufficient foundational facts to authenticate the documents. There is no contention that the custodian was required to

the eviction ban remains in place as to *all* the workers now living there until the identities of those who are entitled to reinstatement are determined. (But see discussion *post.*)[29]

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testify personally. (Compare testimonial requirements of § 1271 with affidavit requirements of § 1561.)

In the growers' view, the affidavit fails to state that the records were prepared in the "ordinary" or "regular" course of business "at or near the time of the act, condition, or event" (§§ 1271, subds. (a), (b), 1561, subd. (a)(3)) and does not show the "mode of preparation" so as to establish trustworthiness. (§ 1271, subds. (c), (d).) But the custodian declares that the records were provided in response to a subpoena seeking the identities of Rancho Sespe workers "during the payroll period immediately preceding January 16, 1979. According to her affidavit, they were prepared in the "normal" course of business and are "the payroll records used and relied upon by [NPMS] in paying the employees who worked at Rancho Sespe and . . . to comply with various wage payment laws." As such, they necessarily were up-to-date employee records, and NPMS' reliance on them amply establishes their trustworthiness. They were properly admitted. (See People v. Williams (1973) 36 Cal.App.3d 262, 274-275.)

[29] The growers argue that Triple M workers already hired by January 16 should be deducted from the positions deemed available on that date for purposes of reinstatement. To the extent this is a concession that some, but not all, available positions had been filled by the time the NPMS employees tried to apply for work, it is inconsistent with assertions elsewhere that *all* hiring had been completed on that date. In any event, the Board concluded that Harris' hiring policies were *solely* motivated by the desire to avoid unionization. Hence, the Board concluded that all jobs on the ranch should be available to the NPMS discriminatees.

The growers also contend that the NPMS workers waived their reinstatement and backpay rights by delaying their applications until after the positions had already been filled. The applications were timely by any reasonable test. They were made within two days after Harris' takeover, despite the failure to provide any application procedure. In any event, they would have been futile even if made instantaneously. There was no waiver.

10. Housing Issues

Finally, the growers seek modification of the no-eviction provision of the Board's order in light of outside proceedings affecting the labor camp. They ask us to take judicial notice of materials which suggest that in 1980, Ventura County condemned the camp as unsafe and uninhabitable and posted notices warning that occupancy is unlawful.[30] A June 1980 superior court injunction, which ordered Rivcom and Newport (owner of the ranch) to make specified repairs, is pending on appeal.[31]

The growers have also obtained a Ventura County unlawful detainer judgment against the labor camp residents. We have stayed enforcement of the judgment pending resolution of this action. (See *Vargas*, supra, 22 Cal.3d at pp. 915-916.)[32]

The Board's ban on eviction, the growers urge, conflicts with the property's condemned status. They contend that section 1103, subdivision (a) of the Uniform Housing Code permits them to abate a structural nuisance "immediately dangerous to life, limb, property, or safety of the public or occupants" by abandoning rather than repairing it.[33]

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[30] According to the notices, the dangerous conditions include substandard gas piping and overflowing sewage from septic tanks.

[31] The superior court injunction apparently was intended to make the camp habitable pending completion of the ALRB proceeding.

[32] We have, however, permitted appeal to proceed in the Appellate Department of the Ventura Superior Court.

The growers also sought mandate to compel the county sheriff to arrest and evict the residents as a consequence of the condemnation. That effort was unsuccessful, and the sheriff, apparently in deference to the ALRB order, has declined to remove them.

[33] The Uniform Housing Code, published by the quasi-official International Conference of Building Officials, forms the basis for housing standards adopted by the state Commission on Housing and Community Development. (Health & Saf. Code, § 17922, subd. (a)(2).)

Subdivision (a)(2) of section 1103 only provides that immediately dangerous premises "shall be ordered vacated." It grants no paramount right to let the housing become unsafe in order to avoid a duly entered ALRB order preventing discriminatory evictions. Were we to agree with the growers' theory, employer-landlords would have an easy means of evicting workers who are not wanted because they have exercised organizational rights. (Cf., *Vargas*, supra, 22 Cal.3d 902, 915; *S.P. Growers*, supra, 17 Cal.3d at p. 725.) Such conduct is repugnant to the Act and to public policy.

On the other hand, the Board concedes that its order runs only against the growers and does not prevent the county from taking actions immediately necessary under state and county law to protect life and limb. Those actions may include appropriately obtained and properly enforced orders to vacate the camp during an immediate peril to health or safety.

Any such action, however, can have no collateral estoppel or res judicata effect on the Board's order. (*Vargas*, supra, 22 Cal.3d at p. 916.) That order implicitly includes the command to maintain the housing in habitable condition at least until the growers reach agreement or good-faith impasse with the union about its future. (*Ante*, fn. 24.) In any enforcement proceeding (see § 1160.8), they may face a heavy burden in showing that an eviction required by health or safety hazards on the property was not the result of their efforts to avoid the Board's directive.[34]

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[34] Our comments assume without deciding that the events represented by the documents the growers offer are true. Hence, there is no need to take judicial notice of them, and the motion for judicial notice is denied.

11. Conclusion.

Petitioners' challenges to the Board's decision and order lack merit. Let a decree issue enforcing the order of the Board in accordance with the views expressed in this opinion.

GRODIN, J.

WE CONCUR:

MOSK, J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
*SPENCER, J.

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* Assigned by the Chairperson of the Judicial Council.

RIVCOM v. A.L.R.B.
S.F. 24520

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent.

My review of the record in this case convinces me that the Agricultural Labor Relations Board (Board) failed to give proper credence to the *unimpeached and uncontradicted* testimony of Larry Harris, president of petitioner Riverbend Farms. (See Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 726.) Harris' testimony demonstrated that petitioners had legitimate and substantial business justifications for replacing the employees of the *unprofitable* predecessor grower, NPMS. Accordingly, the Board erred in rejecting Harris' justifications as "superficial, unfounded and contradictory." There was absolutely *no* evidence that petitioners' actions were prompted by any anti-union motive.

I will not repeat the evidentiary facts which disclosed petitioners' justifications as most of those facts are described in the majority opinion. Because the factual issues raised herein are of no legal importance to anyone but the parties to this litigation, a hearing in this case was improvidently granted, being unnecessary to secure "uniformity of decision" or to settle "important questions of law." (Rule 29(a), Cal. Rules of Court; see *Martori Brothers*, supra, at pp. 731-732 [conc. opn. by Newman, J.].)

I would vacate and set aside the Board's order.

RICHARDSON, J.

RIVCOM CORP., et al v. A.L.R.B.

S.F. 24520

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

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5 Civil No. 5121
(ALRB No. 55)

RIVCOM CORPORATION *et al.*,
Petitioners,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent;

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Real Party in Interest.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
OCT 25 1982
KEVIN A. SWANSON, Clerk

OPINION

Petition for review of order of the Agricultural Labor Relations Board. Order set aside and matter remanded for further proceedings.

Thomas E. Campagne, Thomas M. Giovacchini and Gerald Lee Tahajian for Petitioners.

Ellen Lake, Chief of Litigation, Manuel M. Medeiros, Assistant Chief of Litigation, Robert W. Farnsworth, Edwin F. Lowry and Nancy Smith, Counsel, for Respondent.

Marco E. Lopez, Carlos M. Alcala, Francis E. Fernandez, Carmen Flores, Jerome Cohen, Sanford N. Nathan, Tom Dalzell and Dianna Lyons for Real Party in Interest.

See Dissenting Opinion

We review a decision of the Agricultural Labor Relations Board (Board) determining that petitioners Rivcom Corporation (Rivcom) and Riverbend Farms, Inc. (Riverbend), as joint employers committed unfair labor practices by refusing to employ the workers of petitioner Rivcom's predecessor in interest in violation of Labor Code section 1153, subdivisions (a) and (c),[1] by evicting the workers from housing located on Rivcom's leased farm property in violation of section 1153, subdivision (a) and (c), and by refusing to recognize and to bargain with the United Farm Workers (UFW) as the collective bargaining representative of the workers in violation of section 1153, subdivisions (e) and (a).[2]

The Board affirmed those rulings, findings and conclusions of the Administrative Law Officer (ALO) which were consistent with its decision and adopted his recommended order as modified by the Board. The Board pursuant to section 1160.3 ordered that Rivcom and Riverbend cease discouraging mem-

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[1] All statutory references are to the California Labor Code unless otherwise indicated.

[2] Labor Code section 1153 provides in pertinent part: "It shall be an unfair labor practice for an agricultural employer to do any of the following: [¶] (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in section 1152. [¶] . . . [¶] (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organizaton. [¶] . . . [¶] (e) To refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part. [¶] (f) To recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part."

bership of employees in the UFW or any other labor organization by unlawfully refusing to hire the workers formerly employed by National Property Management Systems (NPMS) or by evicting those workers from housing at Rivcom Ranch, cease refusing to meet and bargain collectively in good faith (§ 1155.2, subd. (a)) with the UFW as the certified exclusive collective bargaining representative of Rivcom's agricultural employees at Rivcom Ranch and cease interfering in any other manner with agricultural employees in the exercise of their rights under section 1153. The Board also ordered that certain affirmative actions be taken, among them to make whole the agricultural employees for losses in pay and other economic losses sustained as the result of Rivcom's refusal to bargain.

FACTS

Rivcom is a wholly owned subsidiary of Riverbend and leases Rivcom Ranch, formerly known as Rancho Sespe. Larry R. Harris (Harris) is the president of both Rivcom and Riverbend, and the principal shareholder of Riverbend. Riverbend is a large citrus packing shed and marketing facility in Fresno County. For many years, Riverbend had packed and marketed citrus grown by numerous Ventura County farmers. Riverbend obtained the citrus by providing the Ventura County farmers with the pruning, harvesting, and hauling services of Triple M. Farms, Inc. (Triple M), a statewide independent contractor owned and operated by Benny Martinez.

The Rivcom Ranch near Santa Paula, formerly known as Rancho Sespe, was owned in 1973 by PIC Realty Corporation (PIC), which corporation sold the farm to Paraships Builders (Paraships). Paraships sold the property to Newport Beach Development Co., Inc. (Newport); Newport leased the property to Rivcom by document dated January 16, 1979. The 10-year lease of January 16, together with an agreement dated January 15, provides for a minimum annual cash rent of $1,675,000, but for no rental payment in any year if a net loss is suffered; if the net profit is less than the stated rent, the rent is equal to the profit. Rivcom is required to pay deficiencies in rent of loss

years from income during years in which net profits are sustained in excess of $140,000 over the minimum annual rent. At the end of the lease, any net loss is paid to Rivcom by Newport.

Before January 1979, while the ranch was owned by various persons or entities, for 35 years it was managed by the same individual, T. Allen Lombard (Lombard). In May 1978, the UFW was certified by the ALRB as the bargaining representative of the agricultural employees of NPMS; however, NPMS and the UFW did not reach agreement on a bargaining contract.

The ranch historically produced various citrus fruits, avocados and nuts through the efforts of a resident labor force living in housing provided by NPMS for a residence rental of $10 a month; many employees had been working on the property for 10 years.

On January 16, Charles McBride (McBride), a vice president of NPMS, informed employees on the ranch that the property had been sold and their jobs were terminated.

Harris, who arrived at the ranch during the afternoon of January 16, testified that he knew sometime in 1978 through trade sources that the UFW had won an ALRB election at the ranch, but that until January 1979 he intended to pack, not farm, and considered the union's certification irrelevant. He did not discuss the matter with Newport, Paraships or the Board. On January 16, Rivcom delivered to the residences of the employees notice of termination of rental upon their cessation of employment by NPMS and gave notice to vacate the premises by February 16, 1979.[3]

Harris testified that he toured the property during the second week in January and knew that drastic changes in ranch operations were required; on January 10, he decided it would

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[3] On January 25, 1979, Rivcom served written 30-day notice of termination.

be best not to hire the former employees to prevent resistance to the anticipated changes in farming practices.

On January 18, 1979, the UFW filed an unfair labor practice charge against Rivcom with the ALRB alleging violations of section 1153, subdivisions (a), (c) and (e). On January 19, 1979, Emilio Huerta (Huerta), from the Oxnard field office of the UFW, telephoned Rivcom attorney, Thomas Campagne (Campagne). The attorney told Harris of Huerta's following demands: recognition by Rivcom of the UFW, reinstatement of all former employees, withdrawal of all eviction notices served on the employees, the immediate commencement of bargaining for a collective bargaining agreement and the negotiation of all changes concerning conditions of employment. Huerta also sent a Western Union mailgram to Rivcom on January 19 containing these demands. On January 19, Harris received the mailgram from Huerta, and the notice from the Board of the unfair labor practice charge filed by the UFW; Harris testified he was confused and directed Campagne to answer Huerta in writing. On January 19, Campagne sent Huerta a letter which responded to the demand for union recognition, but did not mention the hiring or housing issue. The letter stated that the UFW certification was not binding upon Rivcom and any recognition by Rivcom of the UFW would constitute a violation of section 1153, subdivision (f), of the Agricultural Labor Relations Act (Act). (See fn. 2, p. 2, *ante*.)

On January 31, 1982, [sic] some 60 former NPMS employees, who had worked previously on the property now owned by Newport and leased by Rivcom, walked to the Rivcom Ranch office; some carried signs; a delegation of about 5 persons led by Jaime Zepeda (Zepeda) entered the Rivcom office and asked to speak with Harris. A secretary said Harris would be available and asked the group to wait. A few minutes later, a security officer told them to leave the office, that Harris would speak to them outside. They waited in the rain for some 30 minutes before Ventura County Deputy Sheriff Sergeant Juan Mendez (Mendez) asked the workers to leave Rivcom property. Zepeda asked Mendez to relay a message to Harris that the people

waiting wanted to talk to Harris about their jobs. Mendez talked to Harris and then told the group that Harris did not wish to talk with them. Mendez testified the situation was potentially volatile and Harris seemed apprehensive. Harris said he had been told by the sheriff's department it would be dangerous to talk with the workers.

On February 5, 1979, Harris received a letter from Huerta seeking employment for 130 named persons and also received a second unfair labor practice charge which had been filed with the Board by the UFW.

Harris testified that he hired none of the former NPMS employees who had worked on the property. None made an individual application for work.

DISCUSSION

I

THE BOARD'S DETERMINATION THAT RIVCOM'S REFUSAL TO HIRE THE PREDECESSOR'S EMPLOYEES CONSTITUTED AN UNFAIR LABOR PRACTICE

The ALO and the Board both based their decisions that Rivcom committed unfair labor practices for refusing to hire and for evicting the former employees under section 1153, subdivisions (a) and (c) (see fn. 2, *ante*), upon findings that the conduct of Rivcom was motivated by antiunion animus. Such findings are irrelevant unless the basis of their orders was a violation of section 1153, subdivision (c); neither decision discussed whether an independent violation of section 1153, subdivision (a), could be found on this record. Consequently, the Board's decision may be affirmed only if there is substantial evidence to support the following four elements of a section 1153, subdivision (c), violation: that those who sought employment tendered an unconditional application, that petitioners' conduct discriminated between union and nonunion employees, that petitioners' conduct was motivated by an antiunion animus in that petitioners' discriminatory conduct would not have occurred "but for" the workers' protected activity, and

that petitioners' conduct resulted in the encouragement or discouragement of union membership. (See *NLRB* v. *Great Dane Trailers, Inc.* (1967) 388 U.S. 26.)

Petitioners contend that the record does not support findings that the workers' employment applications were unconditional, that Rivcom's conduct was motivated by antiunion animus and that but for the workers' protected activities they would have been hired.

The Board in its reply brief states: "Under ordinary circumstances, an employer must reject or fail to accept an unconditional application for employment before it will be held responsible for an illegal refusal to hire" but gives four reasons why Rivcom's argument concerning the applications must fail. We agree with and discuss one of the Board's arguments.

On February 5, 1979, Rivcom received the following letter dated February 1, 1979, from Huerta on behalf of the UFW:

> "The former employees of National Property Management Systems dba Rancho Sespe, including but not limited to those workers listed on the enclosed six page list, hereby apply for employment with Rivcom Corporation. In doing so they do not waive any seniority or other rights either as employees of National Property Management Systems dba Rancho Sespe or as employees of Rivcom Corporation. Please respond at the above Oxnard address to this application. Failure to respond to this application within five days of the receipt of this letter will be understood as a failure and refusal to rehire these workers."

A list of approximately 140 names of workers was attached to the letter.

On its face, the application received on February 5 is not conditioned upon petitioners' acceptance of any demands of the workers which were previously made. Literally construed, the workers' refusal to "waive any seniority or other rights" only means that if the workers have such rights the application for employment does not waive them. This reference to "seniority or other rights" does not amount to an assertion that the workers possess any vested rights which may be asserted

against Rivcom. Therefore, had Rivcom accepted the applicants for employment, such an acceptance by itself would not have bound Rivcom to respect any later assertion by the workers of additional rights or conditions of their employment. The February 5, 1979, application therefore constituted an unconditional application for employment on behalf of the named employees. We affirm the Board's determination that an unconditional application was made. We find it unnecessary to review the other contentions of the parties regarding the requirement of an unconditional application. Therefore, petitioners' motion to receive exhibit G in evidence is denied.

We next address the question whether the record supports the Board's finding that petitioners' refusal to hire the workers was motivated by antiunion animus as is required for a violation of section 1153, subdivision (c). (See *Radio Officers* v. *Labor Board* (1954) 347 U.S. 17, 42-45.)

The basic rule concerning the burden of proving the presence or absence of antiunion animus are set out in *NLRB* v. *Great Dane Trailers, Inc., supra,* 388 U.S. 26, 35:

> ". . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

Because petitioners do not challenge in their opening brief (*Utz* v. *Aureguy* (1952) 109 Cal.App.2d 803, 808) that the refusal to rehire union members is inherently destructive of employee rights and justifies an inference that Rivcom's conduct was motivated by an impermissible intent (*Rushton & Mercier Woodworking Co.* (1973) 203 N.L.R.B. 123), we conclude that under the test enunciated in *Great Dane Trailers* the burden was upon petitioners to present evidence of legitimate and substantial reasons for their conduct.

Petitioners presented evidence that their conduct was motivated by several business reasons unrelated to the union acti-

vities of the former employees. In this case the justifications offered amount to petitioners' only defense; it is necessary that the Board properly evaluate the justifications. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721; see *Wright Line* (1980) 251 N.L.R.B. 1083-1084, fn. 5.) The Board rejected all of petitioners' justifications on the grounds that they were "superficial, unfounded and contradictory." (*Rivcom Corporation and Riverbend Farms, Inc.* (1979) 5 A.L.R.B. 17.) The Board's decision brought the case within the description in *Wright Line*, *supra*, 251 N.L.R.B., pages 1083-1084, wherein the court stated that the reason advanced by the employer may be termed "pretextual":

> "In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.
>
> "The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a 'good' and a 'bad' reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation." (*Ibid.*)

In reviewing the Board's evaluations of petitioners' justifications, we recognize that employers who take over new businesses are not required to hire the former employees of their

predecessors. (*Howard Johnson Co.* v. *Hotel Employees* (1974) 417 U.S. 249, 261-262.)

Although the Board may reject the asserted business justifications on policy grounds (see *NLRB* v. *Great Dane Trailers, Inc., supra*, at pp. 34-35), the authority to reject business justifications on grounds of unreasonableness is not unlimited. The Board may not reject a business justification *solely* upon the ground that it appears to be unreasonable. (See *N.L.R.B.* v. *Joseph* (9th Cir. 1979) 605 F.2d 466.) The Board may reject a justification by not crediting the testimony of the proponent of the justification. (*Labor Board* v. *Walton Mfg. Co.* (1962) 369 U.S. 404; *La Jolla Casa deManana* v. *Hopkins* (1950) 98 Cal.App.2d 339, 345-346.) However, California provides by statute that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact" (Evid. Code, § 411) and Labor Code section 1160.2 provides that the proceedings under the Act "shall, so far as practicable, be conducted in accordance with the Evidence Code."

Recently the standard of review of cases under the Act was summarized in *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd., supra*, 29 Cal.3d 721 as follows:

> "Findings of the board with respect to questions of fact are conclusive if supported by substantial evidence on the record considered as a whole. [Citations.] While the administrative agency under this test is empowered to resolve conflicts in the evidence and to make its own credibility determination, 'the test of substantiality must be measured on the basis of the entire record, rather than by simply isolating evidence which supports the board and ignoring other relevant facts of record which rebut or explain that evidence.' [Citation.]
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> * * *
>
> "An administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence. [Citation.]
>
> * * *

> "[W]e are satisfied that when a party testifies to favorable facts, and any contradictory evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it." (*Id.*, at pp. 727-728.)

Furthermore, this court is not required to respect resolutions of conflicting evidence or credibility determinations which are based upon inadequate or invalid reasons. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 721, 730-731; *Delco-Remy Div., General Motors Corp.* v. *N.L.R.B.* (5th Cir. 1979) 596 F.2d 1295, 1303-1304; *N.L.R.B.* v. *Moore Business Forms, Inc.* (5th Cir. 1978) 574 F.2d 835, 843-846; *United Insurance Company of America* v. *N.L.R.B.* (7th Cir. 1966) 371 F.2d 316, 323-325.)

Unless an employer's testimony is impeached, contradicted by other testimony or by an inference reasonably deducible from the facts of the case, or unless it is inherently improbable, or the trier of fact reasonably rejected the testimony because of the witness' demeanor, this court must accept it as true.

Because we hold that the Board erred in rejecting certain of petitioners' justifications, we set aside the order and remand the case for a proper evaluation of those justifications; if upon reconsideration the justifications are found to be legitimate and substantial, the Board will determine whether "but for" the protected activity the former employees would have been hired by petitioners. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 721, 731.)

We discuss the various justifications presented by petitioners together with the Board's reasons for rejecting those justifications.

1. Petitioners assert that their refusal to hire the former employees can be justified on the theory Rivcom was giving seniority preference to its own workers. However, petitioners failed to argue this point before the Board, and under the general rule (*Ernst* v. *Searle* (1933) 218 Cal. 233, 240), petition-

ers cannot adopt a new theory for recovery in the reviewing court which was not raised in the trial court. (*Ward* v. *Taggart* (1959) 51 Cal.2d 736, 742.)

While there is an exception to the general rule where the new theory is based upon the same factual circumstances at issue in the trial court and the adverse party was given an adequate opportunity to present all the facts relevant to the new theories (*Ward* v. *Taggart, supra*), on this petition petitioners have not met their burden of establishing that they are entitled to such relief. The argument that petitioners' actions were justified on the grounds Rivcom was following a seniority preference program is waived. (See *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.)

However, we disagree with the Board's contention that because petitioners assert a justification based upon seniority preference in this court for the first time an inference is created that petitioners' conduct was prompted by improper motives. The seniority justification was asserted as a legal theory by counsel for petitioners and is consistent with petitioner Harris' testimony that he preferred Riverbend employees, and consistent with the Board's factual finding that Rivcom and Riverbend are joint employers. No reasonable inference can be drawn from petitioners' citation in this court of different legal precedents that petitioners assert defenses in bad faith.

Because we hold that petitioners waived the seniority issue, we need not discuss respondent's argument that petitioners failed to exhaust their administrative remedies. On remand, the seniority issue may be raised by petitioners; we note that federal precedents provide support on this issue for the legitimacy of petitioners' justification.

2. The Board rejected petitioners' justification that Harris acted pursuant to a management principle of never hiring the former employees of a predecessor because of the difficulties caused through resistance to changes. Harris testified that:

> "[I]n a situation like this, it's very hard in implementing new ideas to get the concensus [sic] of the previous em-

> ployees. And that presented a real problem to me, because we did not have the opportunity, in the way this lease was structured, to make any mistakes and start over. We had to have a confidence we could do it right the first time."

Harris had applied this management principle before to businesses he had taken over which also had been losing money. The Board rejected this business justification on the ground that the decision to apply the principle was not a good decision because Harris had insufficient information regarding the workers at the farm to conclude that they would be a source of resistance to the changes he proposed, and the fact that Harris applied the management principle in the past to smaller farms did not justify its application to the Rivcom operation because it was a larger enterprise.

However, there is no significance in the fact that Harris had never applied the management principle to a ranch as large as this one. Furthermore, Harris had inspected the ranch and had seen the type of farming the workers had done. The changes he wanted to make were significant, including the elimination of housing. He therefore had substantial knowledge of the workers' experience and to what extent they would have to change. The elimination of the farm housing itself would make Harris' expectation of resistance reasonable.

Harris offered the testimony of Dick Richardson, a self-employed custom farmer, who testified that he had assumed management of ranches in the past which previously had been poorly operated, and learned from those experiences that it was best to have a crew with whom the farmer is familiar and a crew the farmer can trust to do the job. Richardson's testimony provides substantial support for the reasonableness of Harris' adherence to his management principle in the following exchange:

> "Q If you found yourself in Rivcom Corporation's position on January 16, what operational changes would you make in an effort to meet that cash rent . . . [u]nder that lease[?]

"A Under that lease. All right. By visual observation of knowing what has been done in the past, of the irrigation system, of pruning techniques in the Valencias, of the cultivation practices, and of the amounts of labor used, I'd probably first, if I had the facilities at my disposal, I would bring in my own crews, my own foreman, people that I know, I trust, people that I have had past experience, know their work techniques, know that they will do what I assigned them. I would then change all the irrigation system that is now under furrow irrigation. I would change that to either sprinkler or drip irrigation.

"I would then try to do something to get the valencia trees down to a height that is readily pickable and meets with Cal-OSHA's standards as far as being able to pick them off a 16-foot ladder. And I would put all of the blocks under non-tillage within a year's time.

"I have found through my own practices, my own operation, that furrough [*sic*] irrigation and cultivation are the most expensive and time-consuming, labor-consuming techniques used on a farm in this day and age.

* * *

"In my own operation, I have taken on several ranches that were in somewhat similar condition to Rancho Sespe, that being cultivated, furrough [*sic*] irrigated, excessively high trees, and have, by putting those orchards into sprinkler irrigation, noncultivation, and trimming the trees, have been able to cut approximately two-thirds of my labor expense, of my irrigation expense, and have been able to cut some of my picking expense.

* * *

". . . I would probably push [the labor camps] out and flatten them. There's a lot of flat ground acreage that could be put into productive use. I have found that in my own farming practice that when ranches have been taken over that have dwellings on them, it's rather difficult to be both a landlord and a farmer. And I'm in the business of farming and not of renting. And in these instances where we've had houses, we have split them off and sold them, tried to get out of the landlord business."

Richardson was hired to farm land by the owners and had the choice of retaining or not retaining former employees. The choices he had to make were indistinguishable from those which confronted Harris, and Richardson's testimony provides direct support for the substantiality of the management principle and stands uncontradicted and unimpeached on the record.

Harris had visited the farm, observed the former employees during work hours, observed the various farming techniques which he believed needed changing, discovered the presence of the labor camps on the property, and reviewed the farm's operating statements. Based upon this information, Harris reasonably could have concluded that the extent of the changes he would have to make were sufficiently great to make it likely that there would be problems in getting the former employees to adjust to the changes. The management principle is given additional support by the fact that Harris, as manager of Riverbend, was employing his own workers who were familiar with some of the changes he intended to make at the farm and who were of demonstrated efficiency. The only reasonable conclusion from these circumstances is that the use of Riverbend employees would make his initial operation of the farm much easier. The Board was not justified in rejecting Harris' decision to apply his management principle on the grounds of reasonableness.

The Board also rejected this justification because of two alleged inconsistencies. First, Harris retained two former supervisors of Rancho Sespe on his payroll as consultants. The Board apparently reasoned that if the only basis for Harris' refusal to hire the predecessor employees was because the ranch was a failing business, there was no reason for Harris to retain part of the managerial staff. (*N.L.R.B.* v. *Foodway of El Paso* (5th Cir. 1974) 496 F.2d 117.) However, Harris adequately explained why these two former supervisors were hired; he testified that they were acting as consultants for Rivcom on a temporary basis to help locate property lines, irrigation systems, pipelines, wells, easements, etc., until the transition of the business could be completed. The two former

supervisors did not have any managerial or supervisorial capacity at the Rivcom ranch. Evidently, the ALO credited this testimony of Harris. The only reasonable inference which can be drawn from this record is that Harris' retention of the two former supervisors in a consulting capacity, considering the size of the farm and considering the fact the ALO did not reject Harris' explanation, was not inconsistent with his stated purpose.

The second inconsistency noted by the Board concerned Harris' failure to inquire into the qualifications of the former employees. However, Harris testified that a substantial reason for not hiring the former employees was that he believed the changes he intended to make would create resistance among the former employees, and that those changes would be more effectively accomplished if he used a labor force with whom he was familiar and had employed in the past. The testimony of Richardson supports the reasonableness of these reasons. Harris' failure to implement a screening process was also consistent with several of his other stated justifications. The Board's rejection of this justification on the ground of inconsistency is not sustainable.

The Board also stated that the management principle was an insufficient justification of Harris' conduct on the grounds of policy, stating:

> "We further note that such a management practice may conflict with the Act's policy of encouraging stable labor relations, and will frequently result in a refusal to hire former employees who are represented by a union."

This statement does not reject the *sufficiency* of the management principle as a justification; the statement indicates that the Board was not ruling on whether the management principle conflicts with the Act and cannot support the Board's rejection of this justification.

The ALO expressly rejected the sufficiency of this justification, saying:

> "Two of Respondents' business justifications, that Harris followed a management practice of not hiring former em-

> ployees because they would resist new ways of doing things, and that Harris therefore decided to hire his own long-time loyal employees whom he could trust and who[m] he had promised full-time employment, are opposite sides of the same coin. The first contention is, by its nature, irrefutable. But it must be rejected as a defense to an unfair labor practice charge. If it were to be accepted, Section 1153(c) would lose much of its force. Any employer could then decide that it, too, believed in the practice and therefore had no obligation to consider former employees because their very status as former employees would be an absolute bar to employment. Such a defense is simply not substantial enough to overcome the well established labor law principle that all applicants for employment must be considered in a non-discriminatory manner. *Phelps-Dodge v. NLRB*, 313 U.S. 177 (1941). It would indeed be ironic if experience, rather than being an asset to an applicant, were to disqualify him from further consideration. A similar defense was summarily rejected in *NLRB* v. *Foodway of El Paso*, 496 F.2d 117 (5th Cir., 1974)."

The Board has the discretion to reject an asserted business justification "even if the employer introduces evidence that the conduct was motivated by business considerations." (*Great Dane Trailers, supra*, 388 U.S. 26, 34.)

We disagree with the sufficiency of the ALO's reason for rejecting Harris' justification on policy grounds that such a justification is irrefutable. A proponent's assertion of the management principle as a justification certainly may be rejected upon the facts of a case. His conduct could be inconsistent with his stated purpose. (See *N.L.R.B.* v. *Foodway of El Paso, supra*.) The circumstances of a case may be analyzed to determine whether it is appropriate to apply the management principle and the Board may reject the application of the principle if an employer fails to show that he is going to make substantial changes in the operation of a business which could be expected to be met with resistance by former employees. Or, if an employer had never applied the management principle in the past when acquiring a business run by nonunion employees and applied the principle for the first time in taking over a business

operated by union employees, the Board could draw an inference that the employer was asserting the management principle as a justification in bad faith and was motivated by an antiunion animus. Obviously, the assertion by an employer that his conduct was based upon the management principle is not the type of defense which is immune from review by the ALRB.

Applicable NLRB precedents have repeatedly remarked on the difficulty placed upon a union when it has to prove that an employer is subjectively motivated by antiunion animus. That difficulty exists with almost every business justification asserted by management. If the Board were allowed to reject the business justification on the ground that it is difficult to refute, the Board would have the power to reject arbitrarily any business justification offered to explain employer conduct, and in turn that rejection by the Board would be unreviewable.

The second reason given in the quoted portion of the ALO's decision for rejecting the management principle as a justification on policy grounds is that it is not substantial enough to overcome the principle that applicants should be considered in a nondiscriminatory manner. This reason refers to the defense as construed in the preceding sentence, that the management principle is an abstract defense unrelated to the circumstances of a case and is unreviewable. But the management principle is not necessarily irrefutable; the Board may reject the principle as a justification in cases where no substantial changes are intended to be made in an organization, where there is no likelihood that the changes would be met by resistance, or where other circumstances indicate that the employer is asserting a principle in bad faith. Also, there is a substantial basis for the application of the management principle in this case. The policy reasons given by the ALO for refusing to accept the application of the management principle as a business justification are insufficient to uphold the Board's determination.

3. Petitioner Rivcom contends that in hiring an entirely new work force it followed its established practice when taking

over a new business and urges that the fact that this hiring pattern was followed tends to negate an inference that petitioners acted with antiunion animus.

The uncontradicted testimony of Harris established that his past practice when he took over a new business was to fire the predecessor's employees and hire his own workers to run the operation; he testified he did this in 1973 when he acquired the Clovis Citrus Packing Company, in 1976 when he purchased an 80-acre ranch, in 1969 when he purchased a 150-acre ranch, and in 1977 when he purchased a 40-acre ranch; none of the predecessors' employees had any union involvement whatsoever in the above examples. Under NLRA precedent, the fact that an employer treats union employees no differently from nonunion employees under similar circumstances tends to establish that such treatment was not motivated by antiunion animus. (*Pellegrini Bros. Wines, Inc.* (1979) 239 N.L.R.B. 1220.)

Respondent attempts to distinguish the cases cited by petitioners on the ground that the cases involve individual workers; however, the issue is the *motivation* behind the action of the employer and not the number of workers affected by the decision of the employer; also, the cases cited by petitioners may not be distinguished on the ground that the employers had a good cause for discharging the workers; while an employee may be discharged for good cause, bad cause, or no cause, the relevant question is the motivation of the employer in taking the action against an employee (*Lippincott Industries, Inc.* v. *N.L.R.B.* (9th Cir. 1981) 661 F.2d 112, 114-115) and not whether the decision of the employer is a good management decision. Because the Board and the ALO did not reject Harris' testimony regarding his past practices on the ground that Harris was disbelieved, the testimony by Harris must be accepted as true by this reviewing court. Harris' testimony concerning his past practices constitutes substantial evidence which tends to refute the inference that his conduct was motivated by antiunion animus.

4. Petitioner Rivcom asserted at the hearing that it did not hire the former Rancho Sespe workers because Riverbend's

employees were better qualified in that they constituted a skilled, competent work force familiar with petitioners' operations. The Board rejected the above justification on the ground that the workers employed by Rivcom had not worked for Riverbend for a substantial amount of time, none for more than two years, and as a second ground for rejecting this justification, the Board noted that Rivcom employed 13 people who had never worked for Riverbend.

The ALO rejected the above justification on the ground that Rivcom's new workers had not been employed by Riverbend for very long and there was inadequate evidence to establish that Riverbend's employees were any more skillful than the former employees of Rancho Sespe.

However, there is uncontradicted evidence in the record to establish a difference between the methods used by Riverbend employees and methods used by former Rancho Sespe employees. One difference is in methods of harvesting, such as use of forklifts to pick across the rows, each employee working with his own bin and keeping count of the amount of fruit picked, and being paid on a piece rate, not an hourly rate. Harris testified that Rivcom's method of harvesting in this fashion "can improve efficiency anywhere from 40 to 50 percent." Robert Gonzales, a former Rancho Sespe foreman, testified that there was a substantial difference between the two methods of harvesting. The record shows that there was also a difference in the pruning methods used by the Riverbend and Rancho Sespe employees. Rancho Sespe employees had not pruned the trees at the Rivcom farm for many years, but Rivcom's employees were familiar with the pruning methods Harris wanted to implement. Consequently, the record is uncontradicted that there was a substantial difference between the methods used by Riverbend and the former methods of Rancho Sespe in harvesting and pruning activities. Respondent's contention that Harris was unable to identify any special skills possessed by Rivcom employees is unsupported with regard to harvesting and pruning activities.

With the exception of temporary laborers, Rivcom's workers had all worked for Riverbend for a minimum of three months and a maximum of two years, which is a substantial amount of time to become familiar with Riverbend's general method of conducting farm operations and with Riverbend's supervisors. The employment with Riverbend indicated to Harris that Rivcom's employees were able to perform efficiently the general type of work he anticipated would be performed at the ranch. The only reasonable inferences to be drawn from these facts are that Harris, as manager of Riverbend, was able to evaluate the past work performance of Riverbend employees, that those employees were familiar with Harris' general methods of work, and that his employees were more familiar with and more skilled in the harvesting and pruning methods used by Harris. The record is silent as to whether Riverbend employees are familiar with other intended changes in methods to be utilized at the farm, including irrigation techniques, frost protection, weed eradication and the plans to initiate the cultivation of geraniums, vegetable row crops and Satsuma oranges. Obviously, petitioner Rivcom was entitled to select workers on the basis that they were more familiar with only some of the methods and changes Harris intended to make at the newly acquired farm.

The Board was in error in determining that Rivcom employees were not more skillful or familiar with the harvesting and pruning activities they were to perform at the Rivcom Ranch. The Board did not err in determining that petitioners failed to show any substantial disparity in skill between former Rancho Sespe workers and Rivcom employees with respect to the other changes petitioner proposed to make. However, Harris obviously was familiar with the efficiency of Riverbend's employees in general and Riverbend's employees were familiar with Harris' general work methods. The only reasonable inference to be drawn from the record is that using employees with whom Harris had worked in the past would result in a more efficient management of the newly acquired Rivcom Ranch. The Board erred in rejecting petitioner's justification on the above stated grounds.

The Board also refused to credit petitioner's justification because Rivcom employees had not had long service with Riverbend; however, with the exception discussed below, all of Rivcom's employees had worked for Riverbend for a minimum of three months; half had worked for Riverbend for more than a year; this amount of time is substantial in view of the seasonal nature of the farm work. The only reasonable inference to be drawn from the record is that Rivcom's employees were experienced in Riverbend's methods of farm work and it must be concluded that Harris had a substantial opportunity to evaluate the Riverbend workers. The short length of service of some of Rivcom's employees with Riverbend does not provide substantial evidence to support the Board's rejection of petitioner's justification.

As mentioned above, the Board in rejecting petitioners' justification also noted that Rivcom hired 13 people to work on the Rivcom ranch who had never worked for Riverbend before. Harris testified that the 13 inexperienced workers were temporary help until Riverbend employees became available; they were hired to help with the prevention of frost damage to orchards; it was petitioner's burden to establish that the 13 workers were experienced with the frost prevention techniques which Rivcom utilized and there is no evidence regarding the experience of the 13 temporary workers. Because petitioner did not meet the burden of establishing that the temporary employees were experienced, it must be inferred that they were inexperienced at frost protection techniques. However, any inference of improper motive or inconsistency is dissipated because the application of petitioner's management rule of not hiring any workers of its predecessor would eliminate former Rancho Sespe workers from consideration for temporary employment irrespective of their qualifications. We conclude that the hiring of the 13 inexperienced workers does not create an inference of antiunion animus and does not constitute an inconsistency which would justify the rejection of petitioner's justifications.

Respondents argue that the finding in *N.L.R.B.* v. *Houston Distribution Serv., Inc.* (5th Cir. 1978) 573 F.2d 260, wherein an employer took over a new business and refused to rehire the former employees of its predecessor, applies to this case. The NLRB found in the *Houston* case that the fact that the employer failed to inquire about the qualifications of the former employees was inconsistent with the employer's stated purpose of having only skilled workers in the new business. The case is distinguishable; here, petitioners had an existing labor force of their own with which they could farm Rivcom Ranch. As discussed above, the labor force was familiar with petitioners' farming methods and operation techniques and could be used more efficiently in farming the property. There was no need to hire additional permanent employees. Petitioners in essence simply transferred their employees from one farm to another. Since no new hiring occurred, there was no reason to take applications or screen the former employees of the farm. In contrast, the employer in the *Houston* case, *supra*, did not have an existing labor force which it transferred to operate the new business, nor a substantial business justification comparable to that of petitioners, and could not explain away the inconsistency between its conduct and the stated purposes. Here, petitioners also had a justification which was consistent with not inquiring into the qualifications of the former employees of the farm, which is the management principle discussed above. Even if the refusal to consider former Rancho Sespe employees was not justified on the grounds of efficiency, it could be justified pursuant to the management principle. Therefore, that principle explained away any apparent inconsistency. We conclude that petitioners' refusal to consider former employees of Rancho Sespe for employment is not inconsistent with petitioners' justifications and did not constitute grounds for rejecting said justifications.

5. The Board rejected petitioners' contention that the radical operational changes Harris intended to make required that Rivcom employ workers it knew to be efficient. The Board held that the changes proposed involved preharvest activities with which Riverbend employees were unfamiliar and that

Harris was not interested in farming the Rivcom ranch but only wanted to obtain the fruit products.

There was uncontradicted evidence in the record that in several areas Harris intended to change substantially the operating procedures at the farm in terms of degree. Harris intended to change the irrigation methods from a high water volume operation using a furrow to a low volume system of sprinkler and drip. The ALO found that 60 percent of the ranch used high volume irrigation. The former manager of the farm testified that he was using low volume irrigation methods to some degree and converted some acreage each year from high to low volume, and would have converted more if more working capital were available. It would seem that Rivcom's plan for irrigation did not involve the implementation of an entirely new system which was completely unknown.

The second area in which petitioner intended to make substantial changes concerns the use of chemical methods in controlling weeds. The record supports the ALO's finding that these techniques were being used on almost 78 percent of the acreage at Rancho Sespe. Lombard testified that the other 22 percent of the acreage required the use of cultivation techniques in order to retard soil erosion. Therefore, Harris' plan to implement chemical methods of weed control at the farm was substantially in effect, but required that a considerable portion of the acreage be converted.

Rivcom's pruning and harvesting methods had not been used before at the ranch. Harris also intended to eliminate the labor housing and convert that area to farming acreage, to introduce geranium and vegetable crops, and to pack avocados in the field instead of transporting them to a packing house.

The only reasonable inference which can be drawn from the record is that petitioner intended to make substantial changes at the farm.

The Board's rejection of petitioner's justification based on the extensive changes to be made, on the ground that River-

bend's employees would be no more efficient at adapting to the changes than the former workers at Rancho Sespe, has been discussed above and as concluded before, the Board's reason is not supported by the record. Rivcom's employees had worked for Riverbend for a minimum of three months and a maximum of two years; that employment with Riverbend indicated to Harris that Rivcom's employees were able to perform efficiently the type of work he anticipated would be required to be performed. The only reasonable inference again to be drawn from these facts is that Harris as manager of Riverbend was able to evaluate the work performance of the Riverbend employees. The record shows that Harris' employees were experienced in some of the new methods he intended to implement at the farm and that he believed with some justification that Riverbend employees were efficient in the farming techniques he used in general. There was no evidence which tended to show that Riverbend employees were not as efficient as the employees who previously had worked on the farm. Harris knew that the workers formerly employed by his predecessor were inexperienced with his pruning and harvesting techniques. Harris was unfamiliar with the abilities of the former workers. To investigate their general abilities in other areas of farm work would require much time and effort. Also Harris did not consider the former Rancho Sespe workers because of his adherence to the management principle that it is best not to hire the employees of a predecessor. The only reasonable inference which can be drawn on this record is that petitioners' justification that the changes Harris intended to make at the farm necessitated his reliance upon the employees of Riverbend is valid and is not inconsistent with his conduct.

6. The Board refused to credit Harris' uncontradicted testimony that he promised the Riverbend employees that they would be given whatever work developed in the Ventura area. Harris testified that he told a crew of about 40 to 50 workers that "whatever [employment was] developed in Ventura County, they would certainly get the first opportunity to take advantage of that employment." The Board rejected the

court makes the following observations for the guidance of the Board upon remand. There appears to be substantial evidence in a review of the entire record to support the Board's determination that there was continuity in the *employing industry*. The Board adopted the test enunciated in *Howard Johnson Co.* v. *Hotel Employees, supra*, at page 263, as to whether there is "substantial continuity of identity in the business enterprise." Where a new employer "uses substantially the same facilities and work force to produce the same basic products for essentially the same customers in the same geogeographic area," it will be regarded as a successor. (*Valley Nitrogen Purchasers, Inc.* (1973) 207 N.L.R.B. 208.) While we note that petitioner Rivcom did intend to implement substantial changes in the operation procedures regarding harvesting, pruning, irrigation, weed control and avocado packing at Rivcom ranch, these changes do not result in any substantial change in the essential nature of the productions at Rivcom ranch, which is a citrus growing and harvesting endeavor. Although Rivcom will also plant vegetables and flowers as crops, the planting of such crops does not change the basic nature of the operations at the Rivcom ranch; it is still essentially a farming activity. (See *N.L.R.B.* v. *Middleboro Fire Apparatus, Inc.* (1st Cir. 1978.) 590 F.2d 4.)

Although Rivcom will have reduced the amount of machinery and equipment used at Rivcom Ranch and changed the techniques of harvesting and pruning, the petitioners will continue to produce, harvest and market citrus fruits, to farm the ranch, to use substantially the same type of work force, to have substantially the same type of jobs available, and to produce the same product, mainly citrus fruits. (See *Border Steel Rolling Mills, Inc.* (1973) 204 N.L.R.B. 814.) Under the test enunciated in the *Border Steel* case the only factor of continuity lacking is that changes will be made in the amount of machinery and equipment used and in the techniques of harvesting and pruning, but under NLRB precedent a lack of a single factor in the continuity of the employing industry will not negate the finding of successorship. (See *Radiant Fashions, Inc.* (1973)

The Board and the ALO rejected petitioners' justifications because of the *haste* with which Harris decided to evict the former employees. We note that even if the ALO were correct in finding Harris' haste unwarranted, that conclusion does not establish that Harris was not acting pursuant to legitimate objectives and, consequently, the fact that Harris' decision was made in haste is not a sufficient ground for rejecting his testimony. Even assuming that Harris personally performed all of the acts which the ALO assumed had to occur within 24 hours of January 16, there is nothing about the 5 or 6 actions and decisions making it impossible for them to be completed in a short period of time. It is uncontradicted that Harris testified that he observed the housing on January 10 and decided then to eliminate it. This indicates that the decision to evict the tenants was not made with the haste described by the ALO and Harris' testimony may not be rejected on that ground.

The Board also rejected Harris' testimony on the ground that the Board did not believe Harris had conducted sufficient soil tests to determine the feasibility of growing crops on the land currently occupied by the labor camp. This reason amounts to a finding that Harris' decision lacked adequate foundation and was therefore unreasonable. Not only may the Board not reject justifications simply because it thinks justifications are unreasonable, but the Board misstates Harris' testimony. Harris testified that he examined visually the ground upon which the labor camp stands, evaluated that it would be suitable to grow some kind of vegetable, flower or tree crop, and intended to conduct further testing after the camps were eliminated to determine what specific crop was to be grown on that ground. There are no facts on the record which would establish that a visual inspection of the soil by a farmer with Harris' farming experience is an inadequate basis for determining that the soil was capable of producing some kind of crop. Consequently, this reason enunciated by the Board is insufficient to justify the rejection of Harris' testimony.

promise as a justification because it was not binding upon petitioners. However, even if the promise does not constitute a separate justification, the fact that the promise was made constitutes conduct on the part of petitioner Harris which was consistent with a neutral application of a management decision to employ Riverbend employees whenever a new business was taken over as discussed above.

The Board rejected the testimony because it was uncorroborated, but the Board could not reject the testimony *solely* for the reason of lack of corroboration.

The Board refused to credit the testimony because Harris could not remember clearly the names of any workers who were present when the promise was made. The promise was made in the fall, before the administrative hearing held in March, and in view of the substantial length of time which passed after the promise was made, it is not unreasonable that Harris would have forgotten details, such as who was present. There were 40 to 50 workers present and it would have been difficult to keep in mind which 50 of the 500 workers employed by Riverbend were there when the promise was made. Harris' inability to remember details does not justify discrediting his testimony. (Cf. *N.L.R.B.* v. *Moore Business Forms, Inc.*, *supra*, 574 F.2d 835, 843-846.)

The Board also rejected the testimony on the ground that the promise was vague. However, this is rebutted by the clarity of Harris' testimony quoted above.

Harris' testimony was also rejected by the Board on the ground that hiring employees for the farm was remote at the time the promise was made; however, Harris did not say that the workers would be employed at Rancho Sespe, but promised the Riverbend workers that he would use their efforts if work opened in "Ventura County." Other evidence exists to establish Harris' intent to employ his workers if future opportunity arose; Harris had hired his employees in the past when taking over businesses, and his adherence to his management principle would be consistent with an intent to hire Riverbend

employees for future work. Such evidence supports the credibility of Harris regarding his testimony that he made the promise, and the inference that the relationship with Riverbend employees was substantial.

The Board's rejection of the uncontradicted testimony of Harris concerning the making of the promise for the reasons given in the Board's decision is not sustainable on this record.

7. The Board rejected Rivcom's justification that it quickly had to implement changes in the operational procedures at the farm because of the onerous nature of the lease. The Board supported its rejection on the grounds that Harris testified that his primary interest in leasing the farm was to obtain fruit for his packing operation, that under the terms of the lease Rivcom could not lose money and was unlikely to keep any net profits because profits would be paid to the lessor, and that Harris did not in fact make any operational changes expeditiously, all of which is inconsistent with the stated justification.

However, Harris' primary motive of obtaining fruit for Riverbend is not inconsistent with a motive to cut costs quickly to maximize profits. If costs in the production of the crops were minimized, profits from the ultimate sale of packaged fruit by Riverbend would be increased. While the lease and the supplemental agreement are complicated documents and it is not clear that they were fully understood, the issue is whether Harris genuinely believed that he could make a profit under the lease. Any cut in expenses at the farm would create a profit for Riverbend even if Rivcom did not show a profit; the Board gave inadequate consideration to this fact. (Cf. *Electrical Workers* v. *Labor Board* (1961) 366 U.S. 667, 681-682.)

It is uncontradicted that the terms of the lease establish that Harris could keep 10 percent of any net profit which was greater than the amount set by the lease as rent. It is also uncontradicted that, under the terms of the lease, Rivcom must begin increasing profits immediately to avoid deficiencies which will be deducted from any net profits in subsequent

years. These provisions permit petitioners to make a profit while at the same time put pressure on petitioners to cut costs as soon as possible. For profits to occur, the operating costs of the farm must be drastically reduced. It was Harris' estimate that he had to cut costs by $625,000 per year. Harris' belief that a rapid cut in expenses was necessary under the terms of the lease comes within the protection of being a business decision. If Rivcom cut its expenses, it could afford to realize some profit which would be paid to the lessor to ensure the renewal of the lease, and yet allow Rivcom to sell fruit at a reduced price to Riverbend; Riverbend would have a guaranteed source of fruit and could realize a greater profit when the fruit was sold. Riverbend, not a party to the lease, would not have to share its profits with the lessor.

Harris was not unreasonable in asserting that he could expect to make profits from the operations at the farm if he cut expenses immediately. The reason given by the Board constitutes an impermissible judgment on the reasonableness of petitioners' justification. Because the record indicates that Riverbend could make a profit from the operations at the farm under the lease, petitioner Harris had a substantial justification for immediately implementing the changes in the operation of the farm.

The Board also rejected this business justification because it concluded that petitioner had failed to implement the changes it proposed expeditiously and that Harris' failure amounted to conduct which contradicted his stated purpose. However, petitioners cite to abundant evidence in the record establishing that Rivcom had started to implement the proposed changes and that it proceeded to make what changes it could with diligence; petitioners' business justification should not have been rejected for the reason that Rivcom promptly did not implement the changes.

The complicated lease and agreement make this justification less clear than it might be. However, there is evidence to sustain this business justification and, even assuming the

Board could reject the justification upon the reasons it gave, that conclusion would not taint the validity of the other justifications.

8. Although Rivcom asserted below that it was a separate entity from Riverbend, the Board rejected this position and found Riverbend and Rivcom to be a joint enterprise.[4] The Board's finding tends to support the substantiality of petitioners' justifications. Rivcom and Riverbend, as joint employers, are in the position of a farmer with a large existing labor force who acquires a new farm and uses his own labor force to run the

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[4] The Board made the following findings on the interrelationship between Riverbend and Rivcom: "We conclude that Rivcom and Riverbend constitute a single, integrated enterprise at the Rancho Sespe property. Factors to be considered in establishing such status are the interrelation of the operations, common management of business operations, centralized control of labor relations, and common ownership. No single factor is determinative and we will not mechanically apply a given rule in making this determination. [Citations.]

"The record shows that Larry Harris is president and manager of both corporations. Riverbend owns all of the Rivcom stock and has an exclusive contract with Rivcom for its fruit, signed by Harris on behalf of both companies. Rivcom performs the pre-harvest activity at the Rancho Sespe property, while Riverbend harvests and packs the fruit. As in *Abatti Farms, Inc., supra*, there is an integration of two functionally different parts. Larry Harris makes the day-to-day management decisions for both companies. Further, Harris obtained Rivcom's lease to farm Rancho Sespe in order to create new marketing opportunities for Riverbend, and he geared the timing of cultivation activities at Rivcom, such as lemon pruning, the provide Riverbend a marketing advantage.

"Harris also has actual control over all the Riverbend and Rivcom employees. Harris has transferred Riverbend managerial employees and Triple M field workers harvesting for Riverbend to the Rivcom payroll. He has also transferred Rivcom employees to the Riverbend payroll. Harris repeatedly asserted his concern for, and his efforts towards, developing a unified, stable, year-round work force, which would necessarily entail the interchange of Rivcom pre-harvest employees and Riverbend harvest employees."

newly acquired farm. In such a situation, the farmer has a more substantial commitment to his employees and it is more reasonable for the farmer to rely upon those employees. Such conclusions apply in the present case, and the Board's findings regarding Rivcom and Riverbend as an integrated enterprise render the justifications of petitioners more substantial.

9. The Board contends that petitioners' abandonment of the "confusion" defense constitutes further evidence of inconsistencies. Harris testified at trial that the reason he did not respond to two demands from the UFW was that he was confused by receipt of the demands for employment from UFW and, at the same time, complaints from the Board of unfair labor practices. The Board contends that this conflicts with Harris' other testimony that there were no positions to be filled when the demands were received. However, Harris' testimony on its face is not contradictory.

The Board also contends that Harris' evasiveness in his denial of knowledge of UFW certification at the farm justified rejecting Harris' testimony. The "evasiveness," however, as described by the Board in its brief, involves matters of minimal significance about which there is no reason to lie and does not amount to evasiveness in the sense that it indicates untruthfulness. The Board's innumerable arguments on this issue are non sequiturs.

The ALO did not find Harris' demeanor to indicate evasiveness. The ALO found:

> "[Petitioners'] studied insistence throughout the hearing and in the brief that they had no 'official knowledge' of the UFW certification, that such certification was in any event irrelevant to Harris, and that Harris never thought to ask . . . about his informal knowledge of the representation election is simply not credible."

The ALO then names various people involved with the sale of the farm as knowing of the certification to establish that Harris must also have known; these findings do not address demeanor evidence, but are arguments that it was unreasonable for

Harris not to know of the certification. As discussed above, Harris' justifications may not be rejected solely on the ground he was unreasonable.

Furthermore, Harris always admitted he knew of union activity and assumed that the farm workers were represented by a union before he took possession of the farm. Harris only insisted he never asked and no one ever told him specifically that the UFW had been certified. This testimony is not inherently unbelievable.

The Board confuses what petitioners' *counsel* asserts to the Board and to this court with the justifications for petitioners' conduct. The Board would have this court hold that any changes in counsel's legal arguments create inferences that none of petitioners' justifications has merit. This is not the rule.

Conclusion:

As to the disagreement among the parties over the applicability of the "but for" test to dual motive cases and pretext cases, the court in *Lippincott Industries, Inc.* v. *N.L.R.B.*, *supra*, 661 F.2d 112, 114-115, resolved an identical dispute by holding that "the difference between these two types of cases is of little importance."

> "The perceived distinction [between a pretext and a dual motive case], however, is more semantical than substantive. In either instance, the employer has asserted justifiable, legitimate business reasons for the discharge. The difference is that in a pretext case the employer's reasons are discredited or otherwise rejected, leaving only the impermissible reason, while in a mixed motive case the relative causative force of the employer's reasons is compared against the impermissible reason to determine whether the latter is the moving cause behind the discharge. Therefore, the primary distinction between the two cases rests upon the differing weight that is attributed to the employer's explanation when examining the motivations behind a discharge. Of course, this determination is made *after* the evidence is presented.

"The artificial distinction existing between these two classes of cases was eroded in *Ad Art, Inc.* v. *NLRB*, 645 F.2d 669, 678 (9th Cir. 1980), where this court stated that, '[w]hen a discharge is *conceivably motivated* both by legitimate business considerations and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge.' (Emphasis added.) Many of our more recent decisions have stated the test without reference to the employer's asserted legitimate reasons. [Citations.] Thus, the test is properly focused on the employer's impermissible motivation to determine whether anti-union animus was the moving cause, or but for cause, behind the decision to discharge an employee. The test so structured gives full recognition to the well accepted maxim that '[a]n employer may discharge an employee for good cause, bad cause, or no cause at all, without violating § 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act.' "

Because the record shows that the Board improperly rejected some of petitioners' justifications and there seem to be substantial justifications which are unrebutted, it is necessary that the case be remanded for proper evaluation of the justifications under a "but for" analysis as employed in *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 721.

In the *Martori* case, the Supreme Court evaluated the reasons given by the board for rejecting the employer's justifications as follows:

". . . [t]he Board concluded that [the employer's justifications] were mere pretext, and that the true reason for Silva's discharge was because of his union activities. The National Labor Relations Board has pointed out that 'pretext' is merely another way of stating that there was no sufficient business justification. (*Wright Line, a Division of Wright Line, Inc.*, *supra*, 105 L.L.R.M. [sic] 1169, 1170 and fns. 4, 5.) Steven Martori was present during most of the misconduct of Silva in 1977, and participated in the hearings relating to the first discharge, which the board concluded was not motivated by union bias. One might

reasonably doubt that he was unaware of Silva's misconduct or that he failed to consider it at the time of the second discharge in 1978.

"The board also deemed it significant that Silva was not terminated immediately after first making threats in 1977, and was in fact reinstated shortly after making major threats. However, he was discharged on the same day that he first made the threats and, although Silva was reinstated the next day, petitioner continued to litigate the validity of the first discharge and merely sought to mitigate damages.

"Condonation is properly invoked only when there is clear and convincing evidence that the employer has forgiven the employee, intending to wipe the slate clean. (*N.L.R.B.* v. *Colonial Press, Inc.* (8th Cir. 1975) 509 F.2d 850, 854-855.) In the present case petitioner vigorously contested the earlier claim of unfair labor practice. In addition, the testimonies of both Steven and Silva as to the opening comments at their meeting on the morning of the second discharge in 1978 reflect Steven's surprise at finding Silva on the premises.

"As the board may have been unaware of the correct legal standard for measuring the propriety of a discharge based in part on the employer's antiunion bias, and as the board may have misapplied the evidence relevant to such a determination, the case should be returned to the board so that it may reconsider its decision. (*J. R. Norton Co.* v. *Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 38-49 [160 Cal.Rptr. 710, 603 P.2d 1306].)" (*Id.*, at pp. 730-731; fn. omitted.)

The above quotation demonstrates that the court in *Martori* limited its scope of its review to the reasons given by the board for its decision; the court did not evaluate whether there was substantial evidence to support the final result reached by the board irrespective of the board's reasoning. The court's determination to remand *Martori* therefore was based upon the rejection of the reasoning in the board's decision either because such reasoning was not supported on the record, or because the reasons given were insufficient on their face.

Support for the *Martori* approach can be found in federal precedents which limit the scope of their review of NLRB cases to the grounds stated by the NLRB for its decision. (E.g., *Delco-Remy Div., General Motors Corp.* v. *N.L.R.B., supra*, 596 F.2d 1295, 1303-1304; *N.L.R.B.* v. *Moore Business Forms, Inc., supra*, 574 F.2d 835, 843-846; *United Insurance Company of America* v. *N.L.R.B.* (7th Cir. 1966) 371 F.2d 316, 323-325; *N.L.R.B.* v. *American Federation of Television and Radio Artists, AFL-CIO* (6th Cir. 1961) 285 F.2d 902, 903.) The United States Supreme Court has gone so far as to remand an otherwise affirmable case to the NLRB because "the legal path by which the Board and the Court of Appeal reached their decisions did not take into account" a particular legal issue which might have affected their analyses. (*Electrical Workers* v. *Labor Board, supra*, 366 U.S. 667, 681-682.)

We hold that the Board in the present case improperly rejected some of petitioners' justifications. The reasons given by the Board for not crediting those justifications were either not supported by the record or were inadequate on their face. Said justifications remain unrebutted on the record in the same fashion as were the employer's justifications in *Martori*.

We are required to set aside the Board's determination and remand for further proceedings. Upon remand the Board should reevaluate the legitimacy of petitioners' justifications in light of this opinion and decide whether the conduct of petitioners would have occurred "but for" the protected activity of the employees. If the Board determines that Rivcom would have acted as it did irrespective of antiunion motivation, then no unfair labor practice occurred. (See *N.L.R.B.* v. *Wright Line, a Div. of Wright Line* (1st Cir. 1981) 662 F.2d 899, 906.) If the conduct of Rivcom would not have taken place "but for" an unlawful motivation, the Board may find that the petitioners committed an unfair labor practice.

II

THE BOARD'S DETERMINATION THAT PETITIONERS' REFUSAL TO BARGAIN WITH THE UFW CONSTITUTED AN UNFAIR LABOR PRACTICE

The basis for the Board's determination that petitioners committed an unfair labor practice under Labor Code section 1153, subdivision (e), in refusing to recognize and bargain with the union which had been certified as the bargaining agent for the former employees of Rancho Sespe was its finding that petitioners had a duty to bargain with the UFW under a rule formulated in NLRB cases called the "successorship" doctrine.

The general rule under NLRB precedent is that an employer who takes over a new business has no obligation to recognize and bargain with a union which was certified to represent its predecessor's employees unless the "successorship doctrine" is applicable to the facts of the case. Under that doctrine, a new owner of a business who is a "successor" is required to recognize and bargain with the bargaining representative of its predecessor's employees. A successor's refusal to recognize and bargain with the union has been held to constitute an unfair labor practice. (See *NLRB* v. *Burns Security Services* (1972) 406 U.S. 272.)

The California Supreme Court in *San Clemente Ranch, Ltd.* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 874 validated the Board's adoption of the successorship test enunciated in federal precedents and also the Board's authority to extend the federal test in appropriate cases to take into account "all relevant considerations relating to a change in ownership." (*San Clemente Ranch, Ltd., supra*, at p. 877.) The Supreme Court allowed the Board broad discretion in determining what *factors* the Board may rely upon in determining successorship issues.[5]

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[5] This court vacated oral arguments originally set in this action for October 10, 1980, pending determination by the Supreme Court of *San Clemente Ranch, Ltd.* v. *Agricultural Labor Relations Bd.*,

Under federal precedents, whether the new owner is a successor depends upon the *degree* of continuity between the enterprise maintained by the predecessor and the organization run by the new owner, continuity between the *work force* of the predecessor and the new owner (the "majority" issue), continuity in the employing *industry*, continuity in the appropriateness of the *bargaining unit*, and the impact of a hiatus in operations at the business.

While the general counsel did not establish that a majority of employees hired by petitioners was formerly employed by the predecessor, petitioners conceded former NPMS employees outnumbered the Rivcom work force by about 140 to 70; therefore, the Board's determination on the "majority issue" is dependent upon its determination that petitioners illegally discriminated against the predecessor's employees. (See *N.L.R.B.* v. *Houston Distribution Serv., Inc.* (5th Cir. 1978) 573 F.2d 260, 266-267.) A new employer is not permitted to defeat a finding of "majority" underlying successorship by discriminating against the employees of the predecessor on grounds they were union members. However, if petitioners did not discriminate improperly against the former employees, the successorship doctrine does not apply in this case. Since we must set aside the Board's determination on the hiring issue, this court must also vacate the Board's conclusion that petitioners' refusal to recognize and bargain with the UFW constitutes an unfair labor practice and remand this issue for further proceedings.

If after remand the Board determines that but for petitioners' alleged discriminatory motives the former employees would have been rehired, the Board must evaluate the other factors relevant to applying the successorship doctrine. This

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supra 29 Cal.3d 874, involving the successorship doctrine at issue in this case. The Board and petitioners agreed that submission of this case be deferred until the Supreme Court ruled on *San Clemente Ranch, Ltd., supra*.

202 N.L.R.B. 938.) Therefore, the Board's determination of successorship is supported as to the continuity between the old and new industry.

III

THE BOARD'S DETERMINATION THAT PETITIONERS' ATTEMPTED EVICTION OF THE FORMER EMPLOYEES OF RANCHO SESPE FROM THE LABOR CAMP WAS MOTIVATED BY ANTIUNION ANIMUS

The ALO found that the attempted eviction constituted conduct which was inherently destructive of important employee rights and petitioners do not challenge this determination. The burden was upon petitioners to establish that Rivcom had a valid justification for its attempted eviction. (*N.L.R.B. v. Great Dane Trailers, Inc., supra*, 388 U.S. 26.) Harris testified that his motivation for evicting the workers stemmed from his desire to eliminate the cost of maintaining the housing, to clear the land for additional farming acreage, and to avoid the problems inherent in maintaining such housing.

The record supports these justifications offered by Harris. The uncontradicted evidence established that the cost to maintain a labor camp at Rivcom Ranch is $70,000 a year, and that, by removing the camp, an additional 60 to 70 acres of farm land can be made available for productive planting.

The reasons given by the Board for rejecting Harris' justifications are insufficient and not supported by the evidence.

The primary reason advanced by the Board and the ALO is the finding that the refusal to hire the former employees at Rancho Sespe was based upon antiunion animus. We have concluded above that this determination must be set aside and remanded to the Board for further proceedings under the *Martori* case. Moreover, the additional reasons presented by the Board for finding the eviction discriminatory are also deficient.

workers formerly employed at Rancho Sespe when the record indicates that not all of those persons would have been employed by Rivcom in any event. The make-whole remedy is limited by its terms to the *losses sustained* by the employees *as the result* of petitioners' refusal to bargain. The only losses which can be compensated are those suffered by the employees who would have been hired by Rivcom from among the former employees at Rancho Sespe. Which former employees would come within this category would be determined at a compliance hearing. Because the remedy may be construed as self-limiting, we hold that it is not overbroad and is valid. (See *Sunnyside Nurseries, Inc.* (1977) 3 A.L.R.B. No. 42.)

The Board directed petitioners to replace their current work force with as many former employees of Rancho Sespe as petitioners could employ, and to put the rest of the former employees on a preferential hiring list. (Order, par. 2(c).) Petitioners contend that the paragraph is too broad in that it would require the replacement of 12 employees who were hired *before* any applications were received from the former NPMS employees. However, on remand, if the Board, after complying with the requirements of the *Martori* case, determines that the failure to hire is an unfair labor practice, it would follow that all of the employees hired by petitioners were selected pursuant to a discriminatory policy and that the appropriate remedy may be to replace all the employees.

Petitioners further contend that it was improper for the Board to include in the make-whole remedy compensation for the expenses incurred by the former employees as a result of their not being hired by petitioners. Although petitioners contend that paragraph 2(d) is overbroad because it requires that expense payments be a part of the make-whole remedy to be paid to each of the former employees of Rancho Sespe, we conclude, as discussed above, that the order of the Board is self-limiting by its terms to those employees actually harmed by petitioners' conduct. Construed in this manner, the Board's order is not overbroad.

Labor Relations Bd. (1979) 24 Cal.3d 335, 350.) Mandate may issue " 'to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.' " (*Tex-Cal Land Management, supra,* at pp. 351-352.)

Included within this grant of authority is the power to direct inferior tribunals in appropriate cases to vacate orders, to conduct further proceedings to reconsider the issues decided by said orders and thereafter to enter new orders. (Cf., e.g., *Hurtado* v. *Superior Court* (1974) 11 Cal.3d 574, 579; *Schweiger* v. *Superior Court* (1970) 3 Cal.3d 507, 518; *Lissner* v. *Superior Court* (1944) 23 Cal.2d 711; *Whitney's At The Beach* v. *Superior Court* (1970) 3 Cal.App.3d 258.)

We conclude that all of the circumstances of this case warrant returning sole jurisdiction to the Board.[15]

Let a decree issue setting aside the order under review and returning the action to the Board for redetermination in light of this opinion.[16] The Board is directed to allow the parties to

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habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

"Superior courts have original jurisdiction in all causes except those given by statute or other trial courts.

"The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

[15] A condition precedent to any further review by this court after the Board issues its new decision is the timely filing of a new petition for review pursuant to section 1160.8.

[16] We respectfully disagree with our dissenting colleague's characterization of the grounds for the reversal.

We have applied the substantial evidence test to the reasons given by the Board for rejecting Harris' many business justifications for his conduct by evaluating whether those reasons are supported by the evidence. We have reluctantly but necessarily concluded that the

file additional briefing on the issues raised herein, to conduct further proceedings and take additional evidence on said issues

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reasons given by the Board are not reasonably deducible from the record or are patently invalid on their face. Additionally, even if the Board had rejected improperly only one or two business justifications, the fact that apparently valid justifications stand unrebutted on the record would require that this case be remanded for a reevaluation of those justifications and the application of the "but for" analysis. *(Martori Brothers, supra.)*

We acknowledge the California precedents cited by our dissenting colleague holding that a judgment may be affirmed even though based upon erroneous conclusions of law or fact provided that the judgment is sustainable for other reasons. (E.g., *Davey* v. *Southern Pacific Co.* (1897) 116 Cal. 325, 329; *Yarrow* v. *State of California* (1960) 53 Cal.2d 427, 437-438.)

However, under federal precedents, the reviewing court may limit the scope of its review of NLRB cases to the grounds stated by the NLRB for its decision. (E.g., *Delco-Remy Div., General Motors Corp.* v. *N.L.R.B.*, *supra*, 596 F.2d 1295, 1304-1305; *N.L.R.B.* v. *Moore Business Forms, Inc.*, *supra*, 574 F.2d 835, 843-846; *United Insurance Company of America* v. *N.L.R.B.*, *supra*, 371 F.2d 316, 323-325.) The United States Supreme Court has gone so far as to remand an otherwise affirmable case to the NLRB because "[t]he legal path by which the Board and the Court of Appeals reached their decisions did not take into account" a particular legal and factual issue which might have affected their analyses. (*Electrical Workers* v. *Labor Board*, *supra*, 386 U.S. 667, 681-682.)

The general rationale for the federal rule was expressed in *N.L.R.B.* v. *American Federation of Television and Radio Artists, AFL-CIO*, *supra*, 285 F.2d 902, 903. The board in *Radio Artists* had based its decision upon the testimony of witnesses Thornburgh and Sheppard which the board conceded should have been excluded from consideration. The board requested the Court of Appeals to apply the federal equivalent of California's rule as follows: "To correct this error, [the Board requests] the Court to disregard the testimony of witnesses Thornburgh and Sheppard. Counsel advance the argument that without the testimony of these two witnesses there is still sufficient evidence to support the order of the Board." (*Ibid.*) The court rejected the Board's request saying, "We cannot speculate on

The ALO rejected Harris' testimony in part because he did not think that Harris "considered whether worker housing might have made economic sense." Again, the ALO's reason is not supported by the record. The uncontradicted evidence establishes that eliminating the labor housing would save $70,000 a year in expenses and provide additional acreage for crops. This reason of the ALO is an insufficient basis upon which to reject petitioners' justifications.

As discussed above, none of the additional reasons presented by the ALO and the Board constitutes a sufficient additional ground for rejecting petitioners' justifications for attempting to evict the tenants. Consequently, the validity of the finding of an unfair labor practice for the attempted evictions must be based solely upon the Board's determination that petitioners' refusal to hire the workers constituted an unfair labor practice. Because the refusal-to-hire issue must be remanded to the Board for redetermination, the Board's determination on the eviction issue must also be set aside and remanded for a reevaluation of the sufficiency of petitioners' justifications and for a determination of whether the evictions would have occurred absent petitioners' discriminatory motives. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd., supra*, 29 Cal.3d 721, 731.)

However, even if this court were to sustain the Board's finding that the refusal to hire was motivated solely by antiunion animus, because we conclude that the economic justifications advanced by petitioner on the eviction issue were improperly rejected by the Board, we would remand this eviction issue to the Board under *Martori*.

IV

THE BOARD'S DETERMINATION THAT PETITIONER RIVERBEND IS AN AGRICULTURAL EMPLOYER

The crucial issue in determining whether Riverbend is an agricultural employer is whether the Board's finding that Rivcom and Riverbend were engaged in a joint and integrated

enterprise is sustainable. Petitioners cite many portions of the record which would support a finding that Rivcom and Riverbend are operated as separate entities; however, other portions of the record support a finding of the Board that Rivcom and Riverbend are an integrated enterprise. To the extent that petitioners do not discuss the evidence cited by respondents which tends to support the Board's determination and show that such evidence is insufficient to sustain the Board's determination, petitioners have waived the issue. (See *In re Marriage of Fink*, *supra*, 25 Cal.3d 877, 887-888.)

V

THE BOARD'S FAILURE TO DETERMINE THE APPROPRIATE BARGAINING UNIT FOR RIVCOM/RIVERBEND UNDER LABOR CODE SECTION 1156.2

In applying the successorship doctrine to petitioners, the Board determined that had petitioners not refused improperly to hire the former Rancho Sespe employees said employees would have constituted a majority of petitioners' work force. Petitioners contend that the above finding of the Board was erroneous because Riverbend employs about 500 agricultural employees. Labor Code section 1156.2 provides as follows:

> "The bargaining unit shall be all agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted."

The above provision requires the Board to determine for certification purposes the number of agricultural employees to be represented by a union. When the successorship doctrine is applied, it is necessary for the Board to determine what the appropriate bargaining unit is in resolving the "majority issue." Petitioners argue that had the Board used the total number of employees of Rivcom/Riverbend, the Board could not have determined that the former employees at Rancho

Sespe constituted a majority of Rivcom/Riverbend's work force and could not have applied the successorship doctrine to petitioners.

We previously remanded the successorship issue to the Board for redetermination. Because this issue is one of the factors relevant to the successorship determination, we appropriately remand this issue to the Board.

VI

THE ADMISSION INTO EVIDENCE OF THE PURPORTED IDENTITY AND NUMBER OF THE FORMER EMPLOYEES AT RANCHO SESPE

Petitioners contend that the hearing officer improperly admitted into evidence exhibits 46 and 48 consisting of an affidavit prepared pursuant to Evidence Code section 1560 et seq. and a list of the employees employed by NPMS immediately before January 16, 1979.

Petitioners first contend that exhibits 46 and 48 were inadmissible because they were not sent by mail to one of the persons authorized under Evidence Code section 1560 to receive them and they were not opened in accordance with section 1560.[6] However, petitioners failed to object to these de-

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[6] The pertinent provisions of Evidence Code section 1560 consist of the following: "(b) . . . when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action . . . and such subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness . . . delivers by mail . . . a true, legible, and durable copy of all the records described in such subpoena to the clerk of court or to the judge if there be no clerk or to such other person as described in subdivision (a) of Section 2018 of the Code of Civil Procedure, together with the affidavit described in Section 1561. [¶] (c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly

fects below and have therefore waived the issue as to these deficiencies.

Petitioners next contend that the affidavit insufficiently establishes the authenticity of the enclosed copies of business records, does not indicate whether the enclosures were prepared in the ordinary course of business, does not indicate how the enclosures were prepared, does not state the source of the information, does not indicate who prepared the enclosures, and does not state adequately that the enclosures were prepared at or near the time of the act, condition or event. (Evid. Code, § 1561)[7]

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inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows: [¶] . . . [¶] (3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address. [¶] (d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received."

[7] Evidence Code section 1561 provides as follows: "(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness; stating in substance each of the following: [¶] (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records. [¶] (2) The copy is a true copy of all the records described in the subpoena. [¶] (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. [¶] (b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1560."

The affidavit states that certain records were requested by a previous subpoena and that "a true copy of those records is enclosed in this envelope." Construed together, these statements in the affidavit adequately establish authenticity of the enclosures. Further, the affidavit establishes that the declarant has custody of various business records and that the enclosed are true copies of those records. A reasonable inference can be drawn from these two assertions when construed together that the copies were prepared either by the declarant or under her direction by another employee. Therefore, the affidavit adequately sets forth who prepared the enclosures. The affidavit states that the records requested by the subpoena consisted of "all lists of . . . employees . . . employed by [NPMS] at Rancho Sespe, during the payroll period immediately preceding January 16, 1979." Construed together with the assertion that "a true copy of those records is enclosed in this envelope," it would appear that those records were prepared "at or near the time of the act, condition or event." Further, the affidavit declares that "these records were prepared in the *normal* course of business." The term "normal" is equivalent to including the term "ordinary." Finally, there is no requirement in Evidence Code section 1561 that the affidavit contain the additional statements petitioners claim should be included as to how the enclosures were prepared and the source of the information. Evidence Code section 1561 has been substantially complied with.

Petitioners contend that the exhibits constitute inadmissible hearsay and were inadmissible because they were in violation of the best evidence rule. Under Evidence Code section 1562 the affidavit and copy of the records constitute exceptions to the hearsay rule and the best evidence rule.[8]

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[8] Evidence Code section 1562 provides in pertinent part: "The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein pursuant to

Petitioners contend that section 1560 et seq. of the Evidence Code only makes an affidavit admissible to the extent that it complies with the foundational requirements established by the business records exception codified in Evidence Code section 1271.[9] Evidence Code section 1562 provides that the exhibits prepared pursuant to that part are admissible "to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit." Section 1562 requires that the affidavit state in detail all of the foundational requirements established under section 1271 if there is an appropriate objection from an adverse party. Petitioners did make appropriate, although somewhat vague, objections before the ALO and the Board. The affidavit satisfies several requirements of Evidence Code section 1271: that the writing be made in the ordinary course of business at or near the time of the act, condition, or event, and that the identity of the writing be established.

Petitioners are correct that the affidavit does not describe the records' "mode of its preparation," the "sources of information" nor the "method . . . of preparation." However, the purpose of these requirements is to establish the trustworthiness of the record as being an accurate recording of the facts contained therein. The business records exception is premised on the idea that either the person who made the record, or the

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Section 1561 and the matters so stated are presumed true. . . . The presumption established by this section is a presumption affecting the burden of producing evidence."

[9] Evidence Code section 1271 provides as follows: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of business; [¶] (b) The writing was made at or near the time of the act, condition or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

informant who provided the person with the information had knowledge of the facts from personal observation. (Witkin, Cal. Evidence (2d ed. 1966) § 583, p. 556.) The trial court has broad discretion in determining the reliability of the record. (*People* v. *Williams* (1973) 36 Cal.App.3d 262, 274-275.)

The affidavit established that the company which kept the records relied upon their accuracy because it paid wages to the persons listed in the record believing them to be employees. The company relies upon the records "to comply with various wage payment laws." Reliance upon the record by the agency keeping the record tends to establish the trustworthiness of the record. (Cf. *People* v. *Williams*, *supra*, 36 Cal.App.3d 262, 275.) The fact that the affiant also declared that "these records were prepared in the normal course of business" implies that they were based upon information acquired from company agents at Rancho Sespe who had personal knowledge of the truth of their facts.

We conclude that there was adequate compliance with the pertinent Evidence Code provisions to allow the admission into evidence of exhibits 46 and 48.[10]

VII

THE BOARD'S REMEDIAL ORDERS—WHETHER OVERBROAD, PUNITIVE, OR IMPROPER

Petitioners challenge various remedies ordered by the Board. First, petitioners point out that the Board made no finding with respect to whether petitioners' refusal to bargain was motivated by bad faith, and therefore the imposition of the make-whole remedy is in violation of *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1. We agree.

The Board imposed the make-whole remedy in this case to compensate the employees "for all losses of pay and other

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[10] In light of our conclusion above, we deny the motions by petitioners to strike exhibits 46 and 48 and for summary reversals.

economic losses sustained by them as the result of [petitioners'] refusal to bargain . . . ."

The make-whole remedy must be set aside under *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.*, *supra*, 26 Cal.3d 1, 27-40, because the Board failed to determine that Rivcom's refusal to bargain was in bad faith. (Cf. *Electrical Workers* v. *Labor Board*, *supra*, 366 U.S. 667, 682-683.) Rivcom's asserted justification for not bargaining with the UFW was that under the Act, the UFW's certification was not binding upon Rivcom and that any attempts to bargain would be violative of section 153, [sic] subdivision (f). This issue was one of first impression under the Act at the time petitioners refused to bargain and was finally resolved by the Supreme Court in *San Clemente Ranch, Ltd.* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 874 on *September 10, 1981*. The Board has determined that an employer's refusal to bargain in order to seek review of a first impression issue under analogous circumstances was reasonable and in good faith and, therefore, did not justify imposition of a make-whole remedy. (See, e.g., *Charles Malovich* (1980) 6 A.L.R.B. No. 29.) Consequently, the make-whole remedy is set aside and remanded to the Board for further proceedings in accordance with *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.*, *supra*.

In arguments I, II and III above, we concluded that the Board's findings on the unfair labor practices at issue should be set aside and remanded for further determination. Because the remedies imposed by the Board were based in part upon its findings and analyses regarding the unfair labor practices and the petitioners' justifications, we conclude that the other remedies imposed by the Board should also be remanded so that the Board may redetermine the appropriate remedies after further findings and decisions are made. Although we need not review the propriety of the other remedies, we make the following observations concerning the imposed remedies for the guidance of the Board upon remand.

Petitioners contend that the Board's imposition of the make-whole remedy is overbroad because it extends to *all* of the 140

Petitioners also maintain that the cease and desist order of the Board is overbroad. This question depends upon the result of the proceedings after remand. If the Board finds that the refusal to hire was based on antiunion animus, the record supports the imposition of a blanket cease and desist order because of the seriousness of petitioners' conduct and the fact that petitioners' subsequent conduct in refusing to bargain and attempting to evict the former employees is continuing.[11]

We reject petitioners' request to consider *Eto* v. *Agricultural Labor Relations Bd.* (1981) 122 Cal.App.3d 41 in any manner; the case has been decertified and under California Rules of Court, rule 977, an unpublished opinion shall not be cited by a court in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. The underlying transaction of concern in the present case is different from the issue in *Eto*, and collateral estoppel does not apply.

VIII

THE CONTENTIONS OF PETITIONERS RIVERBEND AND TRIPLE M

Riverbend and Triple M have each submitted extensive supplemental briefing challenging the Board's decision insofar as it affects them upon the ground that their ability to participate in the oral proceedings was curtailed improperly.

This court exercises its discretion to remand these issues to the Board for determination. First, for the reasons given above, the decision of the Board regarding the unfair labor

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[11] Because the remedies have been set aside, we remand to the Board petitioners' assertion that the alleged condemned status of the farm housing requires that certain remedies be modified. (*Pandol & Sons* v. *Agricultural Labor Relations Bd.* (1979) 98 Cal.App.3d 580, 591.) This court, therefore, denies petitioners' motion to take judicial notice of the alleged condition of that housing. (Cf. *People* v. *Preslie* (1977) 70 Cal.App.3d 486, 493.)

practices must be set aside and remanded for redetermination. Unless the Board upon reconsideration again concludes that Rivcom committed the unfair labor practices at issue and imposes remedies which aggrieve Triple M and Riverbend, the innumerable issues raised by these petitioners will be moot.

Second, this is a reviewing court. The Board has not passed upon the many issues raised by said petitioners.[12] It is appropriate to remand these issues for consideration by the Board in deference to its expertise. (*Electrical Workers* v. *Labor Board, supra*, 366 U.S. 667, 681-682; see *Phelps Dodge Corp.* v. *Labor Board* (1941) 313 U.S. 177, 194; *J. R. Norton Co.* v. *Agricultural Labor Relations Bd., supra*, 26 Cal.3d 1, 29.)

Third, several of the issues regarding the extent and prejudicial effect of the infringement upon said petitioners' ability to litigate appear to involve mixed questions of fact and law which, to be resolved, may require the taking of evidence. The taking and evaluating of evidence and resolution of such legal issues should be done in the first instance by the Board. (See, e.g., *Pandol & Sons* v. *Agricultural Labor Relations Bd., supra*, 98 Cal.App.3d 580, 591, fn. 6; *N.L.R.B.* v. *Miller Redwood Company* (1969) 407 F.2d 1366, 1369.)

Finally, the Board should also have the first opportunity to pass upon what remedy may be imposed to alleviate any prejudice suffered by Riverbend and Triple M. To cure such alleged prejudice may require the reopening of the oral proceedings. (Cf. *Royal Typewriter Co.* v. *N.L.R.B.* (8th Cir. 1976) 533 F.2d 1030, 1043.) The taking and evaluation of such evidence should be left to the Board. (*Pandol & Sons* v. *Agricultural*

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[12] The Board determined only the procedural issue of whether the amendment of the complaint to make Riverbend a respondent resulted in the joinder of Riverbend as a party. (*Rivcom Corporation and Riverbend Farms, Inc.* (1979) 5 A.L.R.B. No. 55, fn. 2.) This determination does not decide the substantive issues raised by Riverbend which are based primarily upon its alleged absence from most of the oral proceedings before the ALO.

Labor Relations Bd., supra, 98 Cal.App.3d 580, 591, fn. 6.) Were this court to attempt to resolve these issues now it would constitute an inappropriate invasion of a province normally reserved for the Board.

DISPOSITION

It is unnecessary to use the limited remand procedure fashioned in *Pandol & Sons* v. *Agricultural Labor Relations Bd., supra*, 98 Cal.App.3d 580 to return this action to the Board. In *Pandol* the reviewing court retained review and enforcement jurisdiction over an ALRB case while remanding the proceedings to the Board for reconsideration of the imposition of an access remedy. There is no need in this action to retain jurisdiction over any of the issues.

The functions vested in this court by Labor Code section 1160.8[13] "are within its original jurisdiction over a proceeding 'for extraordinary relief in the nature of mandamus' " within the meaning of article VI, section 10 of the California Constitution.[14] (*Tex-Cal Land Management, Inc.* v. *Agricultural*

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[13] Labor Code section 1160.8 provides in pertinent part: "Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal . . . . Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, . . . The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

[14] Article VI, section 10 provides: "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in

to the extent the Board decides such steps to be appropriate and to enter a new decision.

The stay previously ordered in this action on July 3, 1980, shall continue in effect only until this opinion is final in all

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what findings the Board would have made without the testimony of Thornburgh and Sheppard. For us to weigh the evidence without the testimony of these two witnesses would put us in a position of making original findings of fact instead of reviewing the findings of the Board." (*Ibid.*)

The California cases provide support for the application of the federal rule in ALRB cases. (See, e.g., *Martori Brothers Distributors v. Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d 721, 730-731; *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.*, *supra*, 26 Cal.3d 1, 27-40; *Pandol & Sons* v. *Agricultural Labor Relations Bd.*, *supra*, 98 Cal.App.3d 580. We are required to follow such precedents.

Labor cases are somewhat unique in their complexity. The task of reviewing a labor decision involves the scrutiny of lengthy evidentiary records often times presenting as many factually conflicting points of view as there are witnesses to the proceedings. The principles of labor law at issue in these cases are frequently esoteric, specialized, complicated and ambiguous. The application of this body of law to conflicting factual sets makes it necessary to analyze the multiplicity of subtle, conflicting inferences inherent in almost every issue in labor law. It is for good reason that courts defer to the expertise of the board to resolve labor disputes so as to preserve their reviewing function. (E.g., *Pandol & Sons* v. *Agricultural Labor Relations Bd.*, *supra*.) These considerations are nowhere better demonstrated than in the present action.

This court agrees with our dissenting colleague that the Board's opinion "is rife with statements of incredulity in reference to Harris' testimony." However, such statements are grounded upon the reasoning expressed by the board for rejecting Harris' justifications. Because we conclude that the Board's reasoning is erroneous, the Board's "incredulity" must also be rejected as a basis for sustaining its decision. (*Delco-Remy Div., General Motors Corp.* v. *N.L.R.B.*, *supra*; *N.L.R.B.* v. *Moore Business Forms, Inc.*, *supra*; *United Insurance Company of America* v. *N.L.R.B.*, *supra*.) Of course, it is

California courts or the California Supreme Court grants a hearing herein, whichever shall first occur. Thereafter said stay is ordered dissolved.

/s/ _____ J.

I CONCUR:

/s/ _____ P.J.

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inappropriate for this court to resolve issues of credibility. (*N.L.R.B.* v. *American Federation of Television and Radio Artists, AFL-CIO*, *supra*, 285 F.2d 902, 903.)

Unfortunately, under the circumstances of this case we are compelled by established precedent to return the action to the Board. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, *supra*; *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.*, *supra*.)

Rivcom Corporation et al. v. *Agricultural Labor Relations Board* 5 Civil No. 5121

DISSENTING OPINION BY ANDREEN, J.

I respectfully dissent.

The majority sets aside the order of the Board and orders a remand because it disagrees with the Board's analysis of the justifications advanced by Rivcom for its refusal to hire the predecessor's employees.

The Board's analysis is broader than that. It discussed the UFW certification as the collective bargaining representative of the Rancho Sespe employees; that Larry Harris knew of this fact; that Rancho Sespe employees were experienced year-round workers, that approximately 30 to 40 percent of these employees had been working at Rancho Sespe for more than 10 years, and that about 10 percent had been working there for over 20 years; that Harris made no inquiries as to their abilities and refused to even consider them as potential employees; he refused to meet with them and rejected outright their offers to work. It found that the lack of consideration given the former employees was based upon Rivcom's desire to avoid dealing with the union. It inferred that Rivcom's explanations were superficial, unfounded and contradictory excuses.

The majority seeks to substitute its inferences for that of the Board. In doing so, it concludes that other inferences are better supported. But the proper test is not whether the inferences drawn by the Board are right, but whether they are reasonable.

Section 1160.8 states: "The findings of the board with respect to a question of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." When discussing a like test found in the Administrative Procedure, the Supreme Court stated, quoting from an earlier case:

> "'[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be

> drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21." (Consolo v. Federal Maritime Comm'n. (1966) 383 U.S. 607, 620, fn. omitted.)

It is the province of the Board, and not of a reviewing court, "'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.' [Citations.]" (*NLRB* v. *Fleetwood Trailer Co.* (1967) 389 U.S. 375, 378.)

The majority maintains that the reasons for rejecting the management principle are not valid. In doing so, the majority not only substitutes its discretion for that of the Board, it examines the *reasoning process* behind the findings.

> "The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey* v. *Southern Pacific Co.* (1897) 116 Cal. 325, 329.)
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> "The order is measured by its terms and not by any reasons the court may give for it. [Citations.] It is recognized that 'the reasons given by the court for its action may be bad, and the decision, at the same time, correct for other reasons. It is the action of the court that is presumed to be correct and this presumption obtains even though the reasons given may be bad.' [Citations.] The reasons

> stated may be valuable in illustrating the trial judge's theory but they are not binding on an appellate court [citation] and they may never be used to impeach the order or judgment. [Citation.]" (*Yarrow* v. *State of California* (1960) 53 Cal.2d 427, 437-438.)

Lest it be argued that an order of the Board is entitled to less deference than a finding of a court in a nonjury trial, we note the language in *Orvis* v. *Higgins* (1950) 180 F.2d 537, 540: "It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding." Particularly instructive is footnote 7 where Judge Frank wrote:

> "A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness." (*Ibid.*)

Established precedents require this court to ignore the Board's reasoning when we review its orders.[1] (*DeCou* v. *Howell* (1923) 190 Cal. 741, 751 [trial court's opinion on the record established that the trial court refused to consider

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[1] The majority reads too much into certain language in *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 727. *Martori* is neither an invitation nor a directive to examine microscopically the reasoning of the board. At page 727 of the opinion, the court reviewed the board's finding—that the ALO had correctly found that the firing of an employee was pretextual. It noted that the board justified this finding by noting that personal threats made by the employee did not prompt discipline and the employee was reinstated shortly thereafter. The court simply enunciated the "but for" test and stated the rule for employer condonation of employee misconduct. The court concluded: "[¶] As the board may have been unaware of the correct legal standard for measuring the propriety of a discharge based in part on the employ-

relevant and probative evidence in rendering its judgment. Held: the opinion may not be used to impeach the judgment]; *Estate of Falcone* (1962) 211 Cal.App.2d 40, 49 ["[E]rroneous conclusions of law or unsupported or erroneous findings of fact will be disregarded as being harmless error if judgments, as rendered, can be sustained on the supported and proper findings made by the trial court"].)

The review of this court should have been limited to determining whether substantial evidence in the record as a whole supports the findings of the Board. (*Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 343.) The Board's resolution of conflicting testimony and credibility issues must be affirmed if they are supported by the record. (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d at p. 727.)[2]

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er's antiunion bias, and as the board may have misapplied the evidence relevant to such a determination, the case should be returned to the board so that it may reconsider its decision. (*J. R. Norton Co.* v. *Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 38-40. . . .)" (*Ibid.*)

[2] The majority attempts to meet these substantial evidence contentions in its footnote 16. Two of the cases cited, *Delco-Remy Div., General Motors Corp.* v. *N.L.R.B.* (1979) 596 F.2d 1295 and *N.L.R.B.* v. *Moore Business Forms, Inc.* (1978) 574 F.2d 835, are Fifth Circuit cases, of which it has been said: "Substitution of judicial judgment for that of the Labor Board may be more common in the Fifth Circuit than in other circuits." (4 Davis, Administrative Law Treatise (1958) Scope of Review of Evidence, § 29.05, p. 142.) The third case, *United Insurance Company of America* v. *N.L.R.B.* (1966) 371 F.2d 316, involved the question of whether insurance agents for an industrial insurance company were employees or independent contractors. The examiner and the board found that the insurance company paid for the agent's travel and other expenses when there was no evidence supporting such finding, and made credibility resolutions based upon demeanor in the courtroom, as distinguished from demeanor on the stand. The case is not authority for the wholesale reweighing of the evidence done by the majority in the instant case. The fourth case cited, *Electrical Workers* v. *Labor*

I believe that the Board's determination on the refusal to hire issue is sustainable on this record. Under *Great Dane Trailers*, the enormous destructive effect of Rivcom's refusal to hire any of the former employees by itself supports an inference that its conduct was motivated by antiunion animus. The existence of such improper motivation is sufficient to render the refusal to hire an unfair labor practice provided the Board's characterization of petitioner's asserted justifications of their refusal as pretexts is sustainable. This characterization is, in essence, a credibility determination. While the numerous inconsistencies in Harris' testimony may appear to be de minimis when they are isolated and scrutinized individually as the majority opinion has done, the Board was free to adopt the principle that the whole is greater than the sum of its parts. The entire pattern of inconsistencies, evasions, uncertainties, and evidentiary gaps in Harris' testimony support the Board's

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Board (1961) 366 U.S. 667, involved a question of whether picketing of a plant gate used by independent contractors was violative of the secondary boycott provisions of the National Labor Relations Act (§ 8(b)(4)(A)). It simply holds that since the gate may have been used by employees of independent contractors who performed conventional maintenance work (as distinguished from such activities as construction work on new buildings, repairs, etc.), the case must be remanded to the board for a further hearing. As I see it, this does not involve a substantial evidence question at all, but a directive to consider the dispute in connection with the law as enunciated by the Supreme Court.

What is termed as the "general rationale" for the "federal rule" (*N.L.R.B.* v. *American Federation of Television and Radio Artists, AFL-CIO* (1961) 285 F.2d 902), appears to me to be a disavowal of a suggestion that the appellate court reweigh evidence.

In reference to the California cases cited in the majority's footnote, the *Martori* case is discussed in the body of this dissent. *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1 is of no assistance to the majority. In it, our Supreme Court set aside a make-whole order which it found had been made pursuant to an invalid administrative rule.

conclusion that Harris' justifications amount to superficial pretexts advanced solely to legitimize conduct which is inherently destructive to protected rights. Upon this record there is substantial evidence by which the Board could conclude the actual cause of Harris' refusal was his antiunion animus. Had the question been one of fact for the jury, I cannot imagine a trial court directing a verdict at the close of the evidence. The Board's determination that the refusal to hire constituted an unfair labor practice is sustainable without having to remand this action to the Board for application of the "but for" standard enunciated in *Martori Brothers Distributors* v. *Agricultural Labor Relations Bd., supra.*

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

Case Nos. 79-CE-1-0X
79-CE-4-0X

5 ALRB No. 55

RIVCOM CORPORATION and
RIVERBEND FARMS, INC.,

Respondents,

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

DECISION AND ORDER

On June 12, 1979, Administrative Law Officer (ALO) Joel Gomberg issued the attached Decision in this proceeding. Respondents and the General Counsel each filed exceptions,[1] a

[1] In his exceptions, the General Counsel contends that Newport Beach Development Company (Newport) is engaged in a joint venture with Rivcom Corporation. At the hearing, after the General Counsel completed his case-in-chief, the ALO dismissed Newport as a Respondent, finding that it was neither an agricultural employer nor a joint employer with Rivcom. At that point, the General Counsel first raised the issue of a possible joint venture between Newport and Rivcom. The General Counsel and Newport's counsel, who served also as Rivcom's counsel, agreed that if the General Counsel raised the joint venture issue at a subsequent compliance proceeding in this matter, Respondents would not raise due-process objections that they were precluded from putting on a case during the unfair-labor-practice hearing. Accordingly, we shall not consider or decide the merits of the joint venture issue at this time, but we note that the issue may be raised in the event of a future compliance proceeding.

supporting brief, and a reply brief. The Charging Party also filed a reply brief.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO to the extent they are consistent with this Decision, and to adopt his recommended Order as modified herein.

Agricultural Employer Status of Riverbend Farms, Inc.

Respondents except to the ALO's conclusion that Riverbend Farms, Inc. (Riverbend), is an agricultural employer. We find no merit in this exception. Both Riverbend, as the harvesting and packing operation, and Rivcom Corporation (Rivcom), as the farming operations, contracted with a company called Triple M to perform work on the Rancho Sespe property. Triple M harvests and hauls the fruit for Riverbend to the Riverbend packing house. Benny Martinez, owner of Triple M, supplies the labor, sets the wages for the crews, and provides the harvesting equipment and the vehicles for hauling the fruit to Riverbend's packing house. Respondents contend that Triple M functions as a custom harvester, rather than merely as a labor contractor for Riverbend, and that it should be considered the employer of the persons on its payroll.

We affirm the ALO's conclusion that Riverbend, rather than Triple M, is the agricultural employer of the harvest employees. All management decisions as to the agricultural operations at the Rancho Sespe property are made by Larry Harris, manager of both Rivcom and Riverbend. Riverbend personnel exercise their own initiative and judgment in overseeing the day-to-day harvest operations. They instruct Martinez and his crews as to where and when to pick the fruit and the number of boxes to be filled. In contrast, Martinez possesses no independent or managerial control over the agricultural operations. *See, e.g., Jack Stowells, Jr.*, 3 ALRB No. 93 (1977); *Napa Valley Vineyards Co.*, 3 ALRB No. 22 (1977). Although there was no evidence that Riverbend personnel exercise any authority to discipline or discharge the Triple M harvest work-

ers, Riverbend field department employees are in the fields daily, checking for quality control, whereas Martinez, Triple M's only supervisor, visits the property only once to three times a week.

Rivcom/Riverbend manager Larry Harris exercised a great deal of control over the selection and work of the Triple M crew members employed on the Rancho Sespe property. He assembled crews from employees who had previously performed work for Riverbend as Triple M employees, and he used Martinez to aid him in selecting the best workers. Harris transferred workers from the Triple M payroll at Riverbend to the Rivcom payroll. He also transferred Rivcom employees performing cultivation work to the Triple M payrolls to do harvest work for Riverbend. Respondents' assertion that Harris' actions in making these transfers came only at the direction of and with the authorization of Martinez is not borne out by the testimony.

The record clearly establishes that Riverbend, rather than Triple M, has the substantial, long-term interest in the ongoing agricultural operation. Upon consideration of the above factors and the total activity of both entities, we conclude that Riverbend is the agricultural employer of employees working at the Rancho Sespe property on the Triple M payroll. *Joe Maggio, Inc.*, 5 ALRB No. 26 (1979); *Corona College Heights Orange and Lemon Association*, 5 ALRB No. 15 (1979).

Single Employer Status of Riverbend and Rivcom

Respondents except to the ALO's conclusion that Riverbend and Rivcom are joint employers.[2] We find no merit in this

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[2] Respondents assert that Riverbend was not a respondent throughout the course of the hearing. At the start of the hearing, the ALO dismissed Riverbend as a respondent and the complaint was amended to allege, as a respondent, "Rivcom Corporation, a wholly owned subsidiary of Riverbend Farms, Inc." The ALO noted that his action did not go to the issue of what liability, if any, Riverbend might

exception. We conclude that Rivcom and Riverbend constitute a single, integrated enterprise at the Rancho Sespe property. Factors to be considered in establishing such status are the interrelation of the operations, common management of business operations, centralized control of labor relations, and common ownership. No single factor is determinative and we will not mechanically apply a given rule in making this determination. *See, e.g., Abatti Farms, Inc.*, 3 ALRB No. 83 (1977); *Louis Delfino Co.*, 3 ALRB No. 2 (1977); *NLRB* v. *Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978); *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 50 LRRM 1343 (1962), *affirmed*, 332 F.2d 902 (9th Cir. 1964), *cert. denied* 379 U.S. 961 (1965).

The record shows that Larry Harris is president and manager of both corporations. Riverbend owns all of the Rivcom stock and has an exclusive contract with Rivcom for its fruit, signed by Harris on behalf of both companies. Rivcom performs the pre-harvest activity at the Rancho Sespe property, while Riverbend harvests and packs the fruit. As in *Abatti Farms, Inc., supra*, there is an integration of two functionally different parts. Larry Harris makes the day-to-day management decisions for both companies. Further, Harrris obtained Rivcom's lease to farm Rancho Sespe in order to create new marketing opportunities for Riverbend, and he geared the timing of cultivation activities at Rivcom, such as lemon pruning, to provide Riverbend a marketing advantage.

Harris also has actual control over all the Riverbend and Rivcom employees. Harris has transferred Riverbend man-

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have incurred for unfair labor practices committed by Rivcom. During the General Counsel's case-in-chief, the ALO noted that the testimony had raised the possibility of Riverbend's having separate agricultural-employer status. At the end of Riverbend's case, the complaint was amended to allege that Rivcom and Riverbend are joint employers and that, as joint employers, they violated certain sections of the ALRA. We find that Riverbend was properly joined as a party herein.

agerial employees and Triple M field workers harvesting for Riverbend to the Rivcom payroll. He has also transferred Rivcom employees to the Riverbend payroll. Harris repeatedly asserted his concern for, and his efforts towards, developing a unified, stable, year-round work force, which would necessarily entail the interchange of Rivcom pre-harvest employees and Riverbend harvest employees.

Respondents assert that Harris has no control over the wages, hours and working conditions of the Triple M crews employed by Riverbend, and that Harris therefore does not possess centralized control of labor relations. Respondent further claims that the absence of centralized control precludes a finding that Riverbend and Rivcom are a single employer. We find no merit in Respondents' contentions. First, it has already been pointed out that Riverbend does exert daily control over the working conditions of the Triple M crews and over the selection of the employees, and that Harris transfers employees between the Riverbend and Rivcom payrolls. While it is true that Martinez sets the wage scale for the Triple M employees, Harris does exercise some control over the terms and conditions of employment for these workers. Under NLRA precedent, a finding of single-employer status does not require a showing of control over labor relations at the local level, but may instead be based upon evidence of control and a centralized labor relations policy at the top-management level. *See Sakrete of Northern California* v. *NLRB*, 332 F.2d 902 (9th Cir. 1964), *cert. denied* 379 U.S. 961 (1965).

Second, although the NLRB considered common control of labor relations to be an important factor in determining whether certain entities operate as a single, integrated enterprise, *Gerace Construction, Inc.*, 193 NLRB 645, 78 LRRM 1367 (1971), the absence of a common labor-relations policy does not preclude finding single employer status. *Abatti Farms, Inc., supra; Canton, Carp's, Inc.*, 125 NLRB 483, 483-484, 45 LRRM 1147 (1959). This is especially true in cases arising under the ALRA. Labor contractors who supply agricultural labor may exert a substantial amount of direct control

over the wages and working conditions of the employees,[3] and yet are excluded from the statutory definition of an agricultural employer. Labor Code Section 1140.4(c). The result is that in agriculture the statutory employer may not exercise direct control over wages and working conditions of the employees. In view of the unique role of the farm labor contractor in agricultural employment, less weight is accorded to the factor of direct control over labor relations than in the industrial setting.

Respondents also except to the ALO's finding that Rivcom is operated exclusively for Riverbend's benefit, asserting that Rivcom functions as would any other outside grower in relation to Riverbend. While there is evidence that Harris plans to institute limited operations at Rivcom which would not directly benefit Riverbend, such as planting geraniums and vegetables, the evidence viewed as a whole establishes that the two companies are so integrated as to constitute a single enterprise. Harris' control over both corporations, the interchange of employees between Riverbend and Rivcom payrolls, Riverbend's ownership of all the Rivcom common stock, the use of a centralized computer system for payrolls, and Harris' assertion that he intends to use Rivcom to further Riverbend's foreign-export marketing activities, all indicate that Rivcom is not simply an outside grower.

Section 1153(c) and (a) Violations—Respondents' Refusal to Hire

Respondents except to the ALO's conclusion that they violated Labor Code Section 1153(c) and (a) by their refusal to hire any former employees of National Property Management Systems (NPMS) at Rancho Sespe. Respondents claim they acted lawfully in refusing to hire the former NPMS employees

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[3] The definiton of a farm labor contractor, as set forth in Labor Code Section 1682(b), includes "any person who . . . supervises, times, checks, counts, weighs, or otherwise directs or measures [agricultural employees'] work."

and in hiring employees who had formerly worked for Riverbend. For the reasons discussed below, we find that Respondents violated the Act by discriminatorily refusing to consider or hire any former NPMS employees.

We start with the principle that the Act must be enforced in such a way as to acknowledge and give appropriate weight both to the right of employers to structure their businesses in the manner which they desire and to the policies of protecting employees and stabilizing labor relations.

> The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and *even eliminate themselves as employers be balanced by some protection to the employees* from a sudden change in the employment relationship. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549 (1964) (emphasis added).

While a new employer is generally entitled to restructure a business, and in fact is encouraged to do so by our competitive economic system, we are mandated to insure that even where a business changes hands, the rights of the former employees and the goals of the labor laws are not obliterated. As Judge Leventhal said in his concurrence in *International Association of Machinists, Dist. Lodge 94* v. *NLRB*:

> The purchaser of a business does not take title unencumbered by the labor relations obligations of his predecessor. He is well advised to analyze labor title as much a real title. Rooted in our competitive enterprise system is a strong policy in favor of free transfer of assets and flexibility of new management attuned to economic efficiency. This is not, however, an absolute value. It must be balanced against the policies of protection for labor and stability of labor relations that are embodied in the federal labor statutes. Under the policies of these laws the new owner does not start with a completely blank slate. *International Association of Machinists, Dist. Lodge 94* v. *NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969) (footnote omitted).

The right of a new employer to restructure its business includes the right to select its own employees. It is not bound by the law to hire the employees of its predecessor. In *Howard Johnson Co.* v. *Hotel Employees*, the United States Supreme Court quoted from its opinion in *NLRB* v. *Burns Security Services*, 406 U.S. 272 (1972):

> We found [in *Burns*] that nothing in the federal labor laws "requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer." 406 U.S., at 280 n.5. . . . *Burns* emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision." 406 U.S. at 287-288. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 261 (1974).

The new employer may not, however, refuse to hire the employees of its predecessor for discriminatory reasons. The Court in *Howard Johnson* went on to say:

> Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under Section 8(a)(3) of the [NLRA, the equivalent of Section 1153(c) of the ALRA]. Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. *See NLRB* v. *Burns Security Services*, 406 U.S. 272, at 280-281, n.5; *K.B. & J. Young's Super Markets* v. *NLRB*, 377 F.2d 463 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967); *Tri State Maintenance Corp.* v. *NLRB*, 132 U.S. App. D.C. 368, 408 F.2d 171 (1968). *Howard Johnson Co.* v. *Hotel Employees*, *supra*, at 262, n.8.

It is now our task to apply these principles to the facts of the instant case and, specifically, to determine whether Respondents' failure to hire any of the former NPMS employees constituted unlawful discriminatory conduct or was simply part of a reorganization of the newly-acquired business enterprise. We find, however, that the task is not so simple as it first appears, and that rather than finding one clear statement of

Respondents' purpose, we must sift through all the facts, and draw inferences from the available evidence. As Judge Frank wrote:

> But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent, or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me," like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland. *F. W. Woolworth Co.* v. *NLRB*, 121 F.2d 658, 660 (2d Cir. 1941) (footnote omitted).

The United Farm Workers of America, AFL-CIO (UFW), was certified as the collective bargaining representative of the NPMS employees at Rancho Sespe on May 17, 1978. The UFW and NPMS had participated in negotiations but had not yet reached a collective bargaining agreement by January 16, 1979, the date when the property was transferred to Newport Beach Development Company (Newport) and was leased by Rivcom. Larry Harris testified that he had become aware through trade sources of the organizing activities and the election results at Rancho Sespe in late spring or early summer of 1978.

The NPMS employees were experienced year-round employees. Approximately thirty to forty percent of these employees had been working at Rancho Sespe for more than ten years, and about ten percent had been working at the ranch for over twenty years. There was no question raised regarding their qualifications as citrus employees. In fact, Harris made no inquiries at all as to the abilities of the workers, and steadfastly refused even to consider these employees for hire. Despite repeated requests for employment by the former em-

ployees, Harris refused to meet with them, and rejected outright their offers to work.[4]

Immediately upon taking over the operations at Rancho Sespe, Harris distributed eviction notices to the employee-residents, rejected the UFW's request to bargain and its request that Harris hire the workers, and brought in Triple M employees who had previously worked for Riverbend.

Respondents set forth several explanations for their refusal to consider or hire any of the former NPMS employees. Harris claims that he needed a skilled, competent crew familiar with his mode of operations, and that he was going to change the methods of operating Rancho Sespe so dramatically that the former NPMS employees would not be able to adapt. Harris also stressed his wish to award his employees' previous service with year-round employment, and to fulfill a promise he had made to his employees to hire them if he obtained the ranch. Respondents claimed that here, as in previous takeover situations, they followed the management principle which opposes hiring employees of the predecessor. Respondents further claim that the former NPMS employees insisted that all or none be hired, and that Harris could not meet this condition since he intended to make the ranch less labor intensive. Another reason advanced for hiring former Riverbend/Triple M employees rather than the former NPMS employees was that Harris needed to start the agricultural operations immediately in order to meet the heavy rental obligations Rivcom had undertaken.

Close examination of the record has brought to the surface the superficial and inconsistent quality of Respondents' claims, and convinces us of their discriminatory motives.

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[4] The only exception to Harris' refusal to meet with the workers was a secret meeting he held with nine former NPMS employees on the night of April 5, 1979, the date that Respondent began to present its defense at the hearing in this case.

Respondents claim that by hiring their own former employees rather than the NPMS employees, they were guaranteeing a skilled, competent work force familiar with Respondents' methods. A close look at records submitted at the hearing shows, however, that Respondents' employee did not have the long service claimed. None of the employees had been working for Riverbend for more than two years, and several had been working for only three months before Riverbend started business at Rancho Sespe. Over half the former Riverbend employees hired to work at the ranch had worked for Riverbend less than one year. Even as to those who were hired two years before, most had worked only as seasonal employees for Riverbend.

In addition, the evidence shows that approximately thirteen people who had never worked for Riverbend before were employed by Respondents. The explanation proferred by Respondents for hiring these employees is that temporary employees were hired to help with frost protection and other matters. Even in hiring temporary help, Respondents did not consider the large pool of former employees seeking work.

Respondents claim that the radical operational changes they plan to make in the agricultural operations necessitate reliance on their own employees, rather than on the former NPMS employees, who are experienced in different techniques. A review of the planned changes, however, reveals that most are in the area of pre-harvest, cultivation techniques, rather than in harvesting techniques. For instance, Respondents plan to change the methods of irrigation, frost protection, and weed eradication. Respondents' argument is weakened since Riverbend apparently previously performed only harvest and packing operations, and performed no pre-harvest work. In fact, Harris testified in detail that he never intended to farm Rancho Sespe, that he was only interested in obtaining the fruit, and that he formed Rivcom only after it was apparent that in order to harvest and market the fruit, he would have to take over a lease of the ranch. Harris further explained that Triple M

performs pruning work for Rivcom, "just like any outside grower."

Respondents rely in part on a promise which was allegedly made by Harris to the former Riverbend employees that he would hire tham at the ranch. First, it is unlikely that Harris would have made any promise to the employees as claimed, given his lack of any personal relationship with them. Harris did not know the workers individually, and did not even know whether, among the group with whom he spoke, any had worked for Riverbend before. Second, the conversation as described by Harris falls short of being a real commitment to the Riverbend employees. Harris claims that he spoke with one crew of between forty and forty-five people whom he considered to be good workers and loyal employees, and told them that they would have the first opportunity of any employment in Ventura County. At the time of this conversation, Harris could not have considered his eventually obtaining any interest in Rancho Sespe as more than a remote possibility, and the "promise" is likewise vaguely stated. In addition, Harris testified that he spoke to only one crew comprising forty or forty-five of Riverbend's 500 employees. At the time of the hearing, seventy-three people had been hired by Respondents, approximately sixty of them former Riverbend employees. There is no evidence of any promise or commitment[5] to many of the people hired by Respondents.

Respondents claim that here, as in prior situations where Harris took over farms, he followed a management practice of not hiring the employees of the failing business. While Respondents may certainly endeavor to improve the financial situation of the ranch by instituting new techniques and operations, as they have indicated they plan to do, the record is devoid of any indication that the NPMS employees were responsible for

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[5] Harris' claimed attachment to his former employees appears disingenuous in light of his claim that it is Triple M rather than Riverbend which is the employer of the employees.

the financial status of their former employer. As has been indicated, Harris never even considered any of these workers for employment, although he never questioned their skills and abilities. Harris' concerns do not adequately explain his wholesale rejection of nonmanagerial employees.[6] We note further that Harris' prior experience in taking over enterprises was limited to one non-farming enterprise—a packing house with eighty employees—and three citrus ranches, all much smaller than Rancho Sespe. There was little evidence concerning these other enterprises. We further note that such a management practice may conflict with the Act's policy of encouraging stable labor relations, and will frequently result in the refusal to hire former employees who are represented by a union.

Respondents claim that the NPMS employees demanded that all or none of them be hired, and that because Respondents were planning to hire fewer employees than NPMS had, they could not meet this demand. A close review of the testimony shows, however, that while the employees demanded that they all be hired, they never imposed the all-or-none condition.[7] The

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[6] Moreover, only two individuals previously employed by NPMS were retained by Harris, as consultants; both had been supervisors for NPMS.

[7] Although Respondents, in their brief, repeatedly refer to the employees' demand for employment as "all or none," not a single witness described the demand in those terms. Respondents correctly quote Sheriff's deputy Mendez as testifying that employee representative Jaime Zepeda told him, "that he wasn't going to accept just a couple of people being hired, that it was a fight for all the people," and that the employees' demand never changed. Respondents claim that Mendez testified that he always understood the employees' demand to be "to hire all of them as a unit or none of them." Unlike the Respondents, we can easily distinguish between a demand to hire all of the former employees and a condition that none of the former employees would accept employment unless all are hired.

record further discloses that Respondents never offered to hire any of the former employees but, rather, refused even to consider them for employment. When UFW representative Emilio Huerta demanded that Rivcom negotiate with the UFW on January 18, 1979, Rivcom answered that it refused to negotiate because recognition of the UFW would violate Section 1153(f) of the Act. On January 31 and February 1, the employees and the Union requested employment for all of the workers. No "all or none" condition was attached. Harris refused to meet with the employees. While Respondents claim that no jobs were available on January 18, the record shows that many employees were hired soon after that date and throughout January.

Although Respondents claim that their heavy rental obligation forced them to begin operations immediately with employees they knew to be good workers, the evidence shows that in fact Respondents did not change many of the former ranch operations quickly, and were still in the planning stages three months after the takeover. Harris testified that for a period of time after he took over the ranch operations, there was little farm work to be done due to the heavy rains and the absence of harvest. And in mid-March, three months after the sale, Harris indicated that he was still basically planning, and that within a few more months the new operations would be underway.

After reviewing all of the evidence in detail, and keeping in mind the Respondents' right to order their business as they see fit, we are persuaded that the lack of consideration given the former employees was based upon Respondents' desire to avoid dealing with the union. While there was no direct evidence of anti-union animus on Respondents' part, close examination of Respondents' many explanations for refusing even to consider this large pool of available, experienced employees discloses merely superficial, unfounded and contradictory excuses, leaving only the explanation that Respondents sought to avoid hiring employees who had already chosen the UFW as their collective bargaining representative.

Section 1153(c) and (a) Violations—Respondents' Eviction Action

Respondents except to the ALO's conclusion that Respondent violated Section 1153(c) and (a) of the Act by evicting the former NPMS employees. We find no merit in this exception. When an employee is evicted from company housing following a discriminatory discharge, it may be inferred that the eviction stemmed from the same discriminatory motives as the discharge. *W. T. Carter and Brother*, 90 NLRB 2020, 26 LRRM 1427 (1950); *Cleveland Veneer Company*, 89 NLRB 617, 26 LRRM 1005 (1950); *Filice Estate Vineyards*, 4 ALRB No. 81 (1978). The same legal principle applies here. The facts here demonstrate the interrelation between the discriminatory refusal to hire and the evictions. Immediately upon takeover, Harris distributed eviction notices to all former NPMS employees, refused to consider them for employment, and refused to meet with the union representatives.

The justifications presented by Respondents do not explain the haste with which the eviction process was begun. We note that while Harris claims that, prior to January 16, he gave no thought to the labor camp which contains over two hundred dwellings and did not realize that employees of the ranch lived there, Harris took action to evict these employees immediately upon takeover.

As we find that the distribution of eviction notices was part and parcel of Respondents' discriminatory refusal to consider or hire the former NPMS employees, we conclude that Respondents violated Section 1153(c) and (a) by the evictions.

Section 1153(e) Violations

Respondents except to the ALO's conclusion that Respondents have a duty to bargain with the UFW as the successor to NPMS. We find no merit in this exception.

Respondents argue that because there is no continuity of the work force[8] between the NPMS employees and those employees hired by Respondents, an essential element of successorship is lacking. It was Respondents' illegal refusal to consider or hire any of the former NPMS employees which resulted in a lack of continuity of the work force. Where the successor employer's discriminatory refusal to hire the predecessor's employees has caused the absence of work force continuity, the continuity will be presumed. *NLRB* v. *Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974); *K. B. & J. Young's Super Markets, Inc.*, v. *NLRB*, 377 F.2d 463 (9th Cir.) *cert. denied*, 389 U.S. 841 (1967).

Respondents further argue that, even if they had hired the NPMS employees, continuity of the work force would still be lacking. Respondents claim that there are twenty-five employees on the Rivcom payroll as opposed to the 140 employees in the bargaining unit of the predecessor, and that such a reduction in size renders the present unit unrepresentative. We disagree. The record shows that the work force under the new management is much larger than twenty-five people. A summary, introduced into evidence, shows more than seventy people on Respondents' payroll. We also note that major harvesting activities, particularly the summer harvest of 700 acres of Valencia oranges, had not yet begun as of the date of the hearing.

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[8] Under the NLRA, continuity of the work force is present if the majority of the successor's employees were employees of the predecessor. *Howard Johnson Co.* v. *Hotel Employees, supra; NLRB* v. *Burns Security Services, supra.* In *Highland Ranch and San Clemente Ranch, Ltd.*, 5 ALRB No. 54 (1979), we found that the concept of work force continuity must be applied more flexibly in the agricultural setting, due to the high turnover in seasonal employment. In this case, however, the former NPMS employees were a year-round, permanent labor force, many of whom had more than ten years service.

We note also that a reduction in the size of the bargaining unit does not necessarily render the unit inappropriate. *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978); *NLRB* v. *Band-Age, Inc.*, 534 F.2d1 (1st Cir.) *cert. denied*, 429 U.S. 921 (1976). We must look to the totality of the circumstances to determine whether the change in ownership has affected the essential nature of the business. *NLRB* v. *Boston Needham Indus. Cleaning Co.*, 526 F.2d 74, (1st Cir. 1975); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025 (7th Cir. 1969).

Respondents contend that they are not a successor to NPMS because of a lack of continuity of operations. We disagree. The business, before and after the transfer, was a citrus and avocado ranch of substantial acreage. Respondents have continued to grow, cultivate and harvest the same basic crops.

Harris plans to institute certain changes in cultivation practices and methods of production intended to increase crop productivity as well as to make the operation less labor-intensive. Nevertheless, based on the record before us, we find that the essential nature of the business has remained the same under the new management and that Respondents, as the employer of the agricultural employees working on the Rancho Sespe property, are the successors of NPMS for purposes of collective bargaining. *See NLRB* v. *Middleboro Fire Apparatus, Inc.*, *supra; see also NLRB* v. *Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970).

We find that Respondents violated Section 1153(e) and (a) of the Act by failing and refusing to recognize and bargain with the UFW as the collective bargaining representative of the agricultural employees.[9]

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[9] Respondents contend that Section 1153(f) precludes the use of the successorship doctrine under the ALRA, because that section forbids an employer from bargaining with an uncertified union and, Respondents argue, a union is certified only in relation to the prede-

Accordingly, we shall order Respondents to offer employment to each and every former NPMS employee listed in Appendix A of the complaint[10] at the Rancho Sespe property. If there are not sufficient positions available at the ranch for agricultural employees on the Rivcom, Riverbend, or Triple M payrolls to hire each of the aforesaid persons immediately, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. We shall also order Respondents to meet, upon request, with the UFW and bargain in good faith, and to make whole the aforesaid former NPMS employees for the loss of wages and other economic losses incurred as a result of Respondents' discriminatory refusal to hire them and the refusal to bargain with the UFW, plus interest thereon computed at seven percent per annum.

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cessor employer. We reject this argument. As the Supreme Court said, in *NLRB* v. *Burns Security Services*, 406 U.S. 272, 279 (1972):

> It has been consistently held that a mere change of employers or of ownership in the employing idustry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.

The concept of successorship is also applicable under the ALRA. *See Highland Ranch and San Clemente Ranch, Ltd.*, 5 ALRB No. 54 (1979).

[10] General Counsel requests that the names Mario Adame and Antonio Becerra be added to the list of names of former NPMS employees in Appendix A. In unlawful detainer complaints which were introduced into evidence, Respondents admitted that Adame and Becerra were former NPMS employees discharged on January 16, 1978. We hereby include Adame and Becerra in the list of employees entitled to relief.

ORDER

Pursuant to Labor Code Section 1160.3, Respondents Rivcom Corporation and Riverbend Farms, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by unlawfully refusing to hire the former employees of National Property Management Systems, dba Rancho Sespe (NPMS), by attempting to evict, or evicting, those employees from housing at Rivcom Ranch provided them as a condition of their employment by NPMS, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c) of the Act.

(b) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondents' agricultural employees at Rivcom Ranch, in violation of Labor Code Section 1153(e) and (a).

(c) In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of their agricultural employees at Rivcom Ranch, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole their agricultural employees, including those persons named in Appendix A of the First Amended Complaint, for all losses of pay and other economic losses sustained by them as the result of Respondents' refusal to bargain, as such losses have been defined in *Adam Dairy* dba

Rancho Dos Rios, 4 ALRB No. 24 (1978), for the period from January 18, 1979, until such time as Respondents commence to bargain in good faith with the UFW and thereafter bargain to contract or impasse.

(c) Offer to the employees named in Appendix A to the First Amended Consolidated Complaint, and to Mario Adame and Antonio Becerra, immediate employment in their former or substantially equivalent jobs, replacing if necessary anyone presently occupying those positions. If there are not sufficient positions available at Rivcom Ranch to hire each of the aforesaid employees immediately, Respondent shall place their names on a preferential hiring list and hire them as soon as jobs become available. The order of employees' names on the preferential list shall be determined pursuant to a non-discriminatory method approved by the Regional Director.

(d) Make whole each of the employees referred to in paragraph 2(c), above, for any losses he or she has suffered as a result of his or her failure to be hired, by payment to each of them of a sum of money equal to the wages they lost plus the expenses they incurred as a result of Respondents' unlawful refusal to hire them, less their respective net earnings, together with interest thereon at the rate of seven percent per annum. Back pay shall be computed in accordance with the formula established by the Board in *Sunnyside Nurseries, Inc.*, 3 ALRB No. 42 (1977).

(e) Preserve, and upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(f) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondents shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) Post at Rivcom Ranch copies of the attached Notice for 90 consecutive days at times and places to be determined by the

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help any union;
3. To bargain as a group and to choose anyone they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect each other; and
5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT refuse to hire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer jobs to all the agricultural employees of Rancho Sespe who were on the payroll on January 15, 1979, replacing if necessary any present employees, and we will pay each of them any money they lost because we refused to hire them. If we do not have enough jobs available to hire all of those employees immediately, we will put their names on a list to be hired as soon as positions become available.

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL NOT take any steps to evict any former Rancho Sespe employees from their homes on the ranch without first

Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(h) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this order.

(i) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order to all employees referred to in paragraph 2(c) above.

(j) Arrange for a representative of Respondents or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondents on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondents shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: August 17, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

bargaining in good faith with the UFW in an effort to come to an agreement about the future of the housing.

Dated:

RIVCOM CORPORATION

By: _____
Representative Title

RIVERBEND FARMS, INC.

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Rivcom Corporation and Riverbend Farms, Inc.	5 ALRB No. 55 Case Nos. 79-CE-1-0X 79-CE-4-0X

ALO DECISION

The ALO concluded that Respondents, Riverbend Farms, Inc., a harvesting operation, and its subsidiary, Rivcom Corporation, a farming operation, were joint agricultural employers and that Triple M Co. was a labor contractor.

The ALO found that Respondents did not cause NPMS, the predecessor employer, to discharge its employees on January 16, 1979, noting the lack of communication or collusion, or of an agency relationship, between NPMS and Respondents, and therefore concluded there was no Section 1153(a) violation.

The ALO concluded that Respondents violated Section 1153(c) and (a) by failing and refusing to hire, or even consider hiring, the former NPMS employees, rejecting Respondents' defense that the onerous conditions of the lease forced them to make drastic changes in operations, and to hire their own employees, finding that the conditions of the lease were not onerous, that Riverbend's employees were more skilled and were able to adapt to the changes, and that the changes were not instituted.

The ALO concluded that Respondents attempted eviction of the former NPMS employees from their labor camp homes violated Section 1153(c) and (a). The ALO rejected Respondents' proffered business justifications that they planned to plant crops on the site and that they could not conform the housing to legal requirements.

The ALO concluded that Respondent did not violate Section 1153(c) and (a) by contracting work out to Triple M. No exceptions were filed with respect to this conclusion.

The ALO concluded that Respondents' admitted refusal to bargain with the UFW violated Section 1153(e), finding that Respondents were a successor to NPMS despite the

fact that continuity in the work force was lacking, as that condition was due to Respondents' discriminatory refusal to hire former NPMS employees. The ALO rejected Respondents' contention that bargaining with the UFW would violated Section 1153(f).

The ALO recommended that Respondent be ordered to cease and desist from its unlawful practices and to offer employment to each of the former NPMS employees. The ALO recommended that if there were not enough jobs on the Riverbend, Rivcom, and Triple M payrolls, Respondents should place the former NPMS employees on a preferential hiring list and hire them as jobs became available. The ALO recommended that the discriminatees be made whole for economic losses resulting from Respondents' failure to hire them and Respondents' refusal to bargain with the union.

BOARD DECISION

The Board concluded that Riverbend and Rivcom were a single, integrated agricutural employer.

Considering both the right of an employer to organize its own business and the Act's policy of protecting employees' rights and stabilizing labor relations, the Board found that Respondents, as a successor, violated Section 1153(c) and (a) by refusing to consider or hire any former employees of NPMS, the predecessor employer. After considering Respondents' asserted justifications, the Board found that the superficial and inconsistent nature of these excuses required it to infer that Respondents' motives were discriminatory.

The Board affirmed the ALO's conclusion that Respondents violated Section 1153(c) and (a) by attempting to evict the former NPMS employees, holding that the discriminatory refusals to hire warranted the inference that the same discriminatory reasons motivated the attempted evictions.

The Board conluded that Respondents violated Section 1153(e) and (a) by their admitted refusal to bargain with the UFW, affirming the ALO's finding that Respondent was the successor to NPMS and noting that the lack of continuity in the work force was due to Respondents' unlawful refusal to con-

sider or hire the former NPMS employees, noting also that the fundamental nature of the business operation remained the same.

REMEDY

The Board ordered Respondents to offer employment to each of the former NPMS employees and, if there are not sufficient jobs for them, to place their names on a preferential hiring list and to hire them as job openings occur. The Board also ordered Respondents to meet and bargain with the UFW and to make former NPMS employees whole for lost wages and other economic losses incurred as a result of Respondents' unlawful behavior.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALBR.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

Case Nos. 79-CE-1-0X
79-CE-4-0X

RIVCOM CORPORATION,
a wholly-owned subsidiary of RIVERBEND FARMS, INC.,
Respondents,

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,
Charging Party.

Received June 13, 1979 Agriculture Labor Relations Board
Exec. Secretary

Robert W. Farnsworth and
Martin Fassler for the
General Counsel

Thomas E. Campagne and
Thomas M. Giovacchini for the
Respondents

Carol Schoenbrunn for the
Charging Party

DECISION OF ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

JOEL GOMBERG, Administrative Law Officer: This matter was heard by me on eighteen hearing days from March 1

through April 13, 1979,[1] in Oxnard, California. The original Complaint (GC Ex. 1-C) issued on February 14. On March 9, prior to the taking of any testimony, I granted the General Counsel's motion to amend the Complaint in the form of a First Amended Consolidated Complaint (GC Ex. 1-D). Several other motions to amend were granted during the course of the hearing. They are embodied in GC Ex. 1-L, 1-N, and 1-O. The Complaint and its amendments are based upon charges filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). The charge in Case No. 79-CE-1-OX (GC Ex. 1-A) was filed on January 18 and served upon Respondent Rivcom on January 19. The charge in Case No. 79-CE-4-OX (GC Ex. 1-B) was filed on February 1 and served upon Rivcom on February 2.

All parties were given full opportunity to participate in the hearing. The UFW intervened, as a matter of right, pursuant to Section 20268 of the Board's Regulations. The General Counsel and Respondents filed post-hearing briefs pursuant to Section 20278 of the Board's Regulations. The UFW filed a letter supporting the position of the General Counsel.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

Respondent Rivcom has admitted in its answer (GC Ex. 1-G) that it is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "the Act"). Respondent Riverbend has denied in its answer (GC Ex. 1-F) that it is an agricultural employer. For the reasons enumerated at pages 27-30 and 33-37, *infra*, I find that Riverbend is an agricultural employer within the meaning of the Act, and that Riverbend and Rivcom constitute a single,

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[1] All dates refer to 1979 unless otherwise noted.

joint employer pursuant to Section 1140.4(c) of the Act. The Board's certification of the UFW as the exclusive bargaining representative of the agricultural employees of National Property Management Systems, (hereafter "NPMS") dba Rancho Sespe, in case No. 78-RC-6-V (GC Ex. 1-K), establishes that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices.

The First Amended Consolidated Complaint alleges that Rivcom is the successor to the bargaining obligations of NPMS under the Act and that its admitted refusal to bargain with the UFW is violative of Section 1153(a) and (e) of the Act. The General Counsel further alleges that those persons named in Appendix A to the Complaint were agricultural employees of NPMS and that Rivcom has caused their discharge by NPMS and has refused to hire them because of their actual or presumed support of the UFW, in violation of Section 1153(a) and (c) of the Act. Finally, the General Counsel has alleged that those persons named in Appendix B to the Complaint were tenants in housing provided to them by NPMS as a condition of employment and that Rivcom's admitted attempt to evict them from the housing is violative of Section 1153(a) and (c) of the Act.

Rivcom denies that it has succeeded to the bargaining obligations of NPMS. It argues that recognition of the UFW would in itself be a violation of Section 1153(f) of the Act. Rivcom denies that its failure to hire any of the former employees of NPMS was based on their union membership. Rather, Rivcom decided to hire employees who had previously been employees of Riverbend or of Triple M Farms, a labor contractor/custom harvester which supplied labor for Riverbend for several years. Rivcom asserted several additional defenses to the refusal to hire allegations. See pages 20-25, *infra*.

III. The Facts.

This case involves labor relations issues at a 4,300 acre ranch between Fillmore and Santa Paula, commonly referred to as Rancho Sespe, its Spanish land grant title.[2] Approximately 1,500 acres of the ranch have been used to grow citrus, including valencia and navel oranges, grapefruit and lemons, as well as avocados. Until January 16, the ranch had been managed for thirty-five years, under various owners, by T. Allen Lombard. Since 1973, the ranch had been owned by PIC Realty Corporation (hereafter "PIC") a subsidiary of Prudential Insurance Company. NPMS managed the property pursuant to a contract with PIC.

On January 16, PIC sold the ranch to Paraships Builders, a corporation formed by Erik Watts and Joseph Pressutti for the purpose of purchasing the property. Paraships immediately transferred title to Newport Beach Development Co., Inc., a corporation formed by six Fresno area men for the purpose of buying the ranch. When Newport became the owner of Rancho Sespe, a lease it had previously executed with Rivcom, under which Rivcom would farm the ranch, took effect. During the morning of the 16th, Charles McBride, a vice-president of NPMS, addressed the assembled employees at the ranch, informed them that the ranch had been sold and notified them that their jobs had been terminated. Larry Harris, President of Rivcom, arrived at the ranch sometime during the afternoon.

A. The Representation Election and Certification.

The UFW received a majority of the votes cast in a representation election held on May 9, 1978, among the agricultural employees of Rancho Sespe (GC Ex. 21). On May 17, 1978, the Board certified the UFW as the bargaining representative of

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[2] Rancho Sespe has recently been renamed Rivcom Ranch. I will simply refer to the property as "the ranch" with respect to events occurring after the sale date.

all the agricultural employees of Rancho Sespe in the State of California (GC Ex. 22). On October 2, 1978, the Board amended the certification, describing the employer as "National Property Management Systems, dba Rancho Sespe," rather than "Rancho Sespe." (GC Ex. 1-K). NPMS and the UFW engaged in bargaining prior to the sale but did not reach agreement on a collective bargaining contract.

B. The Agricultural Enterprise Prior to January 16.

Under Lombard's management, Rancho Sespe produced and harvested valencia (700 acres) and navel oranges (60 acres), lemons (380 acres), grapefruit (150 acres), avocados (200 acres), and macadamia nuts (1 acre). Virtually all the cultural and harvest work was performed by a permanent, essentially year-round, resident labor force. The workers lived in housing provided by NPMS for a nominal rent of ten dollars a month. According to Lombard, approximately 40% of the work force had been working at Rancho Sespe for ten years or more. With the exception of some mechanical tree-topping equipment which was provided by an outside contractor, the ranch owned all the equipment necessary to run the operation, including a large number of pick-up trucks and other vehicles. A complete inventory of the large equipment was made by Rivcom in January and appears at pp. 40-44 of Respondents' Exhibit C. The ranch also provided picking tools such as ladders, gloves, scissors, and size rings. Approximately three-quarters of the ranch used chemical, non-cultivation techniques of weed control, while the remainder was cultivated by tractors with discs. According to Lombard, soil conservation dictated the continued use of cultivation on the hillier portions of the ranch in order to minimize erosion.

C. The Negotiations Leading up to the January 16 Transfers.

Joseph E. Pressutti is a Los Angeles certified public accountant who also invests in agricultural property. Early in 1978 Mr. Pressutti purchased a citrus orchard in the southern San

Joaquin Valley, known as Sky Valley Ranch, from Prudential or its subsidiary, PIC. He entered into a contract with Riverbend to harvest, pack, and market some of the fruit on the ranch. Riverbend's president, Larry Harris, met Pressutti while they were in college. They have been friends for more than ten years. Pressutti frequently consults with Harris about the advisability of purchasing various agricultural properties.

Sometime in the spring of 1978, a Prudential employee with whom Pressutti had negotiated the purchase of Sky Valley, told Pressutti that Rancho Sespe was for sale and asked him if he might be interested in purchasing it. Pressutti asked for information about Rancho Sespe and was subsequently sent a prospectus. After receiving the prospectus, Pressutti contacted Harris to find out what he knew about the ranch. Pressutti testified that he could not remember if Harris said he was interested in Pressutti's possible purchase of the ranch. When asked if he could remember anything of what Harris had said about Rancho Sespe, Pressutti, after a long pause, replied: "I really can't think of anything I can tell you." (TR VII, 166). Harris testified that he had been aware that Rancho Sespe was for sale six or seven months before Pressutti contacted him. Harris did not testify about the content of this first "informal" discussion with Pressutti.[3]

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[3] The facts set forth in this paragraph are undisputed and not crucial to the resolution of the issues in this case. Yet, Respondents' post-hearing brief at pp. 2-3 gives a detailed account of the conversation between Harris and Pressutti about which there is absolutely no record evidence. The account ends with the assertion that Harris first learned that Rancho Sespe was for sale during the conversation, which is directly contrary to Harris's own testimony at TR II, 135. Respondents' brief is riddled with an astounding number of factual errors and an alarming number of references to matters about which there is no record evidence. Because it would be a gargantuan task to refer to every one of these instances of created, distorted, or contradicted assertions, I will only refer to those which bear on signifi-

In May, June, or July, 1978, Pressutti met with Lombard at Rancho Sespe. Lombard gave Pressutti a brief tour of the ranch and provided him with crop estimates, revolving fund estimates and accounts receivable estimates. In June or July, 1978, Pressutti began to negotiate with PIC for the purchase of the ranch. During early September, 1978, PIC demanded a $150,000 cash deposit from Pressutti. Because Pressutti did not have the money, he contacted Erik Watts, a developer and investor, in an effort to obtain it. A few days later, Watts put up the $150,000 and Watts and Pressutti made a deposit on the purchase of Rancho Sespe. On November 27, 1978, Watts and Pressutti received a non-assignable option to purchase the ranch for $11.8 million.[4] Pressutti testified that it was during the negotiations with PIC in September that he first learned

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cant issues. Respondents' brief, p. 1, notes that it was written prior to the receipt of all transcripts. However, the entire transcript in this matter was sent to the parties no later than twelve days after the hearing closed. Volume II was in the hands of counsel well before the hearing ended. Respondents' brief is unpaginated. I have numbered the pages beginning with the first page of the statement of facts.

[4] Respondents' brief, p. 2, states that Pressutti talked to Watts shortly after his first conversation with Harris. But Pressutti twice testified that he didn't approach Watts until September. Both Watts and Harris testified that they visited the ranch with Pressutti in July. The brief, p. 4, asserts that Pressutti introduced Watts to Harris during this visit, but Harris testified that he had met Watts earlier, in connection with another real estate transaction with Mr. Pressutti. (TR II, 123). I credit the testimony of Harris and Watts that there was a tour of the ranch in July. This is just one of many instances in which Pressutti's testimony was vague, evasive, or inaccurate. Inexplicably, Respondents' brief, p. 8, refers to an offer Pressutti made to PIC to purchase the ranch through a "land sale contract." The brief goes on to indicate that the offer was rejected by PIC after Pressutti obtained $150,000. The record is bare of any references to a "land sale contract" or rejected offers.

that negotiations between the UFW and NPMS were underway (TR VII, 184).[5]

Erik Watts testified that Pressutti was one of his accountants and that Watts was using Pressutti as his "pawn" in his plans to purchase Rancho Sespe for development as a multifaceted development, including condominiums, hotels, and a Heritage Ranch and museum. According to Watts, Pressutti contacted him about the possible purchase of the ranch in March, 1978. Pressutti asked Watts, as a favor, to meet his friend Larry Harris who was interested in securing a contract to pack and market Rancho Sespe's fruit. Watts met Harris, presumably on the tour in July, found him to be impressive, but young and somewhat immature, and decided that he would not let Harris pack the fruit.[6]

Prior to entering into the option, Watts directed Pressutti to check out various financial institutions and other sources of loan money. On August 30, 1978, Pressutti met with Mike Jewett, General Manager of the Federal Land Bank in Ventura. At the meeting, Pressutti told Jewett that he and a more substantial investor were seeking an $8-9 million loan to purchase Rancho Sespe. Pressutti indicated that the property would be continued as a citrus ranch. Jewett expressed skepticism that the ranch was capable of generating enough income to meet the payments on such a large loan. The Land Bank had

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[5] Respondents' brief, p. 43, has Pressutti testifying that he could not recall being told by PIC of any union involvement at Rancho Sespe. Again, this is a reference to testimony that does not exist.

[6] Respondents' brief, p. 6, cites non-existent testimony of Watts to the effect that he did not tell Pressutti of his decision not to let Harris pack the fruit because he feared that Pressutti might inform Harris and that Harris would therefore not aid in Watt's efforts to obtain a loan from the Federal Land Bank in Ventura. Actually, Watts testified that he told Pressutti: "Joe, he's too far away. He's too young. I know he's a friend of yours." (TR XI, 42).

lent money to the owners of Rancho Sespe in 1973. That loan was smaller and had always been kept current.[7]

By November, Watts had made a fairly firm decision to finance the purchase of Rancho Sespe through a loan from the Executive Life Insurance Company. Watts testified that he exercised virtual carte blanche authority over the use of the company's assets. However, Pressutti prevailed upon Watts to give Harris another opportunity to meet with him and prove that he was capable of packing and marketing the fruit and, in addition, that Harris "could put together a group which could make the kind of a deal which I would be interested in accepting which was that I handled totally the development and somebody else handles totally, you know, the unsafe part of the investment which is the fruit." (TR XI, 42).

About November 20, 1978, Harris contacted Mike Jewett[8] and asked him to come to Fresno to discuss the loan further and to tour the Riverbend packing plant. Pursuant to Watts's desire to find a group to handle the farming investment, Harris also invited Monroe Telford, a retired Federal Land Bank official. Telford, who has known the Harris family at least since Larry's childhood, owns a small citrus orchard in the San Joaquin Valley for which Riverbend acts as packer and marketer.

The meeting took place on November 24, three days before Pressutti and Watts entered into the option agreement with PIC. According to Jewett, Watts did most of the talking. He discussed non-agricultural uses for the ranch. Watts and Pressutti asked Jewett a number of questions about the current operations of the ranch, but Jewett got little, if any,

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[7] Respondents' brief, pp. 7-8, details an interesting conversation between Pressutti and Jewett concerning Pressutti's intent to have Riverbend pack and market the fruit and Jewett's interest in learning more about Riverbend. There is no such testimony.

[8] Respondents' brief, p. 9, claims that Pressutti invited Jewett to the meeting.

information from them. Neither Watts nor Pressutti spoke about farming the property. Telford spoke on Harris's behalf in an effort, according to Telford, to persuade Jewett that Harris would do a good job as packer and marketer of the fruit. Harris testified that Watts and Pressutti came to him seeking help in obtaining financing for the purchase. It was Harris's understanding that they were having difficulty raising funds. Harris testified that he suggested that Pressutti talk to Mike Jewett. Harris stated that Telford came to the meeting to provide a reference for him to Jewett. According to Harris, Watts attended the meeting but was not introduced to Telford until later, although he did introduce Telford to Pressutti.[9] I credit Jewett's testimony about the circumstances and content of the November 24 meeting. His testimony was consistently thoughtful, measured, and precise.

Shortly after the option was signed, Watts learned from Lombard about an unusually bad frost at the ranch. This information motivated Watts to put together a deal which would give him development rights over the ranch but leave the farming risk to others. Pressutti sounded out Telford about the possibility of forming a joint venture or partnership. Telford contacted five other men, including Glenn Wilkins, who eventually formed Newport. He also toured the property with Wilkins and Harris. Watts and Pressutti met with the Newport group and negotiations began. Although Watts still preferred to keep the ranch operating as it was, he was willing to let Harris pack and market the fruit as long as there was no risk to him.

Telford and Wilkins barely knew Watts and Pressutti and were not interested in a joint venture or partnership. As the negotiations continued in late December and early January, it was decided that Watts and Pressutti would buy Rancho Sespe

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[9] Respondents' brief, pp. 9-10, has Harris attempting to persuade Jewett that Riverbend could receive better returns on the fruit than the current owner. There is no such testimony in the record.

and immediately sell it to Newport. Newport and Watts and Pressutti would simultaneously enter into an agreement giving Watts and Pressutti an option to buy approximately 1500 acres of the ranch's pastureland. Newport sought financing from the Bank of America in Fresno and began to think about who would farm the property. Telford and Wilkins decided to approach Harris. He studied the situation and entered into negotiations with Telford to lease the property.

Representatives of Newport (which incorporated on January 12), Paraships (which was also incorporated about this time) and PIC gathered at the law offices of Gibson, Dunn & Crutcher in Los Angeles on January 13, to work out the final details of the sale transactions. The lease between Rivcom and Newport had apparently been signed in Fresno by this time.[10] The form of the sales and lease agreements had been approved by the Newport board on January 12. (GC Ex. 15). A great deal of haggling between Paraships and Newport immediately preceded the signing of the sales agreements in the early hours of January 16. The last-minute disagreements were, according to Watts, genuine, but part of the game of negotiations. (See TR XI, 49).

During the final day of negotiations. January 15, Richard Strong, an attorney with Gibson, Dunn & Crutcher who was representing PIC, handed Pressutti an envelope containing a letter from George Preonas, the labor attorney for NPMS. He also placed several large folders next to Pressutti. The folders contained information about the negotiations between NPMS and the UFW. Strong testified that Pressutti opened the envelope, looked at the letter, but left the folders in the room when he left. Pressutti testified that he looked at the letter and handed it to his attorney, Robert Kopple. Pressutti testified

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[10] Harris testified that the lease was signed at a law office in Fresno. TR II, 126. Respondents' brief, pp. 38-39, states that Harris signed the lease at Gibson, Dunn & Crutcher where he and Telford had a conversation which does not appear in the record.

that: "I think he (Kopple) told me that it was notification of union negotiations." (TR VII, 188).[11] Strong testified that he had advised Ken Manock, an attorney for Newport, on Sunday, January 14, that he had material about union negotiations that he wished to turn over pursuant to PIC's contractual obligations to Paraships. Mr. Manock replied: "I assumed you would." (TR VII, 137). On Tuesday, January 16, Strong told Manock that Pressutti had left the folders behind and that Manock was free to take them. Manock said that he did not want the folders but gave no reasons to Strong.[12]

D. The Sale, Lease and Option Documents.

1. Between PIC Realty and Watts and Pressutti or Paraships.

The November 27, 1978, option between PIC and Watts and Pressutti is not in evidence. Testimony indicates that the *Agreement of Sale and Escrow Instructions* (GC Ex. 23) was drafted on or about the option date, although it is dated Janu-

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[11] Respondents' brief, p. 46, has Kopple telling Pressutti not to concern himself with the union because Paraships was about to transfer the ranch to Newport. No such testimony appears in the record.

[12] Respondents' brief, pp. 46-47, attributes two imaginary statements to Strong which, even by the rather loose standards of the brief, are outrageous: "Mr. Strong states that as the representative of PIC Realty, he was concerned that Paraships might attempt to avoid the transfer on the argument that P.I.C. Realty had not fully disclosed their status with the United Farm Workers Union." And, after Strong made the files available to Manock on the 16th, the brief has Manock say: "that Mr. Pressutti was not his client but that Newport was, and that since Newport would not be involved in farming the property it had no interest in reviewing the file . . ." Brief at p. 47. Mr. Manock did not testify at the hearing and there is nothing in the brief (18 pages) recorded testimony of Strong which bears the remotest resemblance to the brief's attributions. Volume VII of the transcript was distributed less than a week after the close of the hearing.

ary 15, 1979. The Agreement of Sale defines the property and provides that all the real and personal property is to be sold. Section 8(c) of the Agreement refers to labor negotiations and incorporates the contents of Exhibit Z. Exhibit Z is an acknowledgment by Watts and Pressutti that they have recieved a copy of the ALRB certification (GC Ex. 21) and that they are aware of the legal duty of NPMS to negotiate in good faith with the UFW. Section 26(e) of the Agreement, headed "Litigation," states that with the exception of the labor negotiations there are no proceedings "which would be a material hindrance or disadvantage to Buyer in the future ownership or operation of the Sale Property . . ." Both Watts and Pressutti initialled Exhibit Z but had not recollection of doing so. Pressutti, as noted earlier, testified that he had been informed that negotiations were taking place. Pressutti, however, testified that he never mentioned this fact to Harris or any of the people associated with Newport. Watts testified that he had no reason to be concerned with labor negotiations because he believed that Lombard would continue to operate the farm. The deed transferring Rancho Sespe from PIC to Paraships is in evidence as GC Ex. 12.

2. Between Paraships Builders and Newport Beach Development Co., Inc.

None of the documents executed between Paraships and Newport mentions the ALRB certification in particular or labor relations in general. In fact, Telford testified that he had never seen Exhibit Z or the Sale Agreement between PIC and Paraships. However, the *Escrow, Option & Development Agreement* (R. Ex. B) between Paraships and Newport, dated January 16, incorporates the Sale Agremeent by reference.

The Bill of Sales between Paraships and Newport refers to the Sale Agreement in order to define the personal property being transferred. The Bill of Sale refers specifically to Section 8(f) of the Sale Agreement. Section 8(f) appears one page after the Labor Relations subsection of Section 8.

The "Closing Agreement—Paraships to Newport" (GC Ex. 17) refers to the "PIC Sale Agreement" and states that it was attached to the November 27, 1978, option. The Closing Agreement refers to specific subsections of the Sale Agreement at least a dozen times.

According to the witnesses for Newport and Paraships, attorneys were involved in the drafting of the transfer agreements. While Telford, Pressutti and Watts negotiated, the documents were prepared by the lawyers and then signed. In addition to the transfer documents, Newport also signed three loan agreements relating to the purchase with the Bank of America. The Bank made loans to Newport totalling $11,600,000.

3. **Between Newport and Rivcom.**

Telford and Harris negotiated three agreements on behalf of Newport and Rivcom respectively. Rivcom had been incorporated four to six years earlier as a data processing company. Its only current activity is the operation of the ranch. The lease between Newport and Rivcom is dated January 16 (GC Ex. 3). Paragraph 3 provides for a minimum annual cash rent of $1,675,000, and establishes a profit sharing mechanism requiring payments over and above the minimum rent under certain circumstances. However, the provisions of paragraph 3 have been superseded by a document entitled "Agreement" dated January 15. It provides for no rental payment for any year in which there is a loss, as defined. In a year in which Rivcom makes a profit of less then $1,675,000, the rent is equal to the profit. There is a profit sharing agreement for years in which there is a profit in excess of $1,675,000. There are also provisions requiring Rivcom to pay deficiencies in rent from previous years during years of high profit. Paragraph (f) of the Agreement stipulates that if there is still a net loss at the end of the lease that loss shall be paid to Rivcom by Newport. In sum, the agreement is a rather technical document which clearly

provides that Rivcom cannot ever lose money on its ranch operations.[13]

The third document signed by Telford and Harris is called "Supplemental Agreements Re Lease" (GC Ex. 3-B). In this document, dated January 16, Newport agrees to waive its right to bring claims against the shareholders, directors, officers, agents, and employees of Rivcom by piercing the corporate veil.

Throughout the hearing and in their brief, Respondents have referred to heated negotiations between Rivcom and Newport. (There is no testimony that the negotiations were contentious. The two negotiators, Harris and Telford, were good friends.) Because Harris was desperate to get the opportunity to pack and market the fruit from the ranch, it is suggested, he was forced to agree to an onerous rental payment. According to Wilkins, however, the lawyers determined that $1,675,000 was a fair rental figure. He could not explain how the figure was arrived at. Nor did Wilkins know why the Agreement and Supplemental Agreements were separate documents. He explained that the Agreement was entered into in order to be fairer to Harris, and to give him an incentive and that the Supplemental Agreements were entered into because Newport wanted to satisfy Harris's concerns. However, no witnesses attempted to explain why the requirement for a minimum cash rent was deleted.

E. Rivcom, the UFW and the Former Employees.

Harris testified that he knew through trade sources, sometime in 1978, that the UFW had won an ALRB election at Rancho Sespe. (TR II, 164).[14] But, because he intended to be only a packer and not a farmer, at least until early January, he

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[13] The lease also provides that Rivcom will share in any profits realized by Newport if it sells the ranch.

[14] Respondents' brief, p. 44, claims that Harris didn't know there had been an election or its outcome until January 17 or 18.

did not consider the UFW's certification to be relevant to him. He asked no questions about the union, either to Newport or Paraships or the ALRB. The subject never came up.

Harris took a tour of Rancho Sespe sometime during the week preceding January 16, and decided that he would have to make drastic changes in the operations of the ranch. He decided that it would be best not to hire any of the former employees so that there would not be resistance to the drastic changes. Harris's business justifications for not considering the former employees for hiring will be considered in detail in Section F, *infra*.

The first communication between Rivcom and the UFW came in a phone call from Emilio Huerta, of the UFW's Oxnard field office, to Thomas Campagne, Rivcom's labor attorney. Campagne told Harris that Huerta had made several demands including recognition by Rivcom of the UFW, reinstatement of all the former employees, withdrawal of all eviction notices, and bargaining about all changes in conditions of employment. On the same day, Huerta sent a mailgram to Rivcom making essentially the same demands. (GC Ex. 4). Harris received the mailgram on January 19, at the same time as the first charge in this matter. (GC 1-A). Harris testified that he was confused because he couldn't understand why the UFW was filing an unfair labor practice charge at the same time it was making demands. Harris directed Campagne to respond to Huerta in writing. On January 19, Campagne sent Huerta a letter (GC Ex. 5) which responded to the demand for recognition, but did not even mention the hiring and housing issues. In the letter, Campagne stated that it was Rivcom's position that the UFW certification was not binding on it and that any recognition by Rivcom of the UFW would constitute a violation of Section 1153(f) of the Act. Campagne's letter is the only communication of any kind from Rivcom, Riverbend, or Harris to the UFW.[15]

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[15] Harris was, however, willing to discuss job issues with a group of former employees on April 5. No UFW representatives were pre-

On January 31, a group of perhaps 60 former Rancho Sespe employees walked to the ranch office. Some carried signs saying "We want our jobs" and "Mr. Carter, what about our rights?" A delegation of approximately five former employees, headed by Jaime Zepeda, went into the office and asked to speak to Harris. A secretary told Zepeda that Harris would speak to the workers and that they should wait for him. Five or ten minutes later a security officer told the five to leave the office. He said that Harris would speak to them outside. The five went outside and waited in the rain for more than half an hour. At Harris's request, Sergeant Juan Mendez of the Ventura County Sheriff's Department asked the group of workers to leave Rivcom property. The workers complied. Zepeda asked Mendez to relay a message to Harris that the people wanted to talk to him about their jobs. Mendez, experienced in labor relations matters, complied with the request. Harris told Mendez that he didn't want to talk. Mendez relayed the message to Zepeda. The group dispersed.

Mendez testified that the situation on the 31st was potentially volatile and that Harris seemed apprehensive.[16] Harris said that he had been told by somebody from the Sheriff's Department that it would be dangerous to talk to the workers. Harris did state that he knew the people had come seeking work.

On February 1, Emilio Huerta wrote Harris a letter (GC Ex. 8) seeking employment with Rivcom on behalf of 130 persons whose names were attached to the letter. Harris received this letter on February 5, the same day that the second charge in this matter came in his mail. Harris did not respond to the letter.

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sent, nor were former employees identified with the UFW permitted to join the discussion.

[16] At one point, Mendez said he was "shocked" when he saw the size of the group of former employees. He later said "surprised" was a more appropriate word than "shock". Mendez testified that there was no unruly behavior or violence during the entire incident.

Harris testified that he has hired none of the former Rancho Sespe employees and that he has not considered their qualifications or experience in making the decision not to employ them. None of the former employees made an individual application for work. While Rivcom has employment applications, they are typically used for clerical and managerial personnel and not for farm workers. Rivcom made no attempt to tell the former employees how they should go about applying for work. Its only communication with the former workers was through the vehicle of eviction notices. None of Rivcom's current employees ever filed an employment application.

F. Rivcom's Business Justifications for Failing to Consider or Hire any of the Former Rancho Sespe Employees.

Larry Harris asserted a number of business reasons for his decision not to consider the former employees for jobs on the ranch after January 16.

According to Respondents' brief, p. 28, the first reason was that: "Mr. Harris's examination of Sespe's operating statements and his tour of the ranch had led him to believe that the stringent 1.7 million annual rental payments could not be met unless rapid and drastic operational changes were implemented." These changes, it is argued, could be achieved more rapidly with members of a crew on the Triple M payroll who had previously been working as pruners and harvesters for Riverbend. Harris also testified that his primary interest in the ranch was in securing the fruit for Riverbend. Operation of the ranch as a farmer was a necessary evil. In fact, Harris had never before managed a farm not owned by himself or his family. It is clear that making a profit on the pre-harvest operations at the ranch was not a matter of concern for Harris; he would have been happier having nothing to do with farming the property. Harris testified that he signed the lease principally to obtain the fruit. ". . . (T)his particular arrangement (the lease) was one that was very attractive not so much from a farming standpoint, but from the marketing stand-

point." (TR XIV, 70). Harris later stated, after a pause for thought, that he believed that the farming venture could be profitable.

In this context, Harris's first reason appears pretextual because the lease as modified by the agreement provides for no rental payments at all if there is a net loss in operations. If there is a profit of less than $1,675,000, then the rent is equal to the profit. If there are any unrecovered losses at the end of the lease, these must be paid to Harris by Newport. So, there is no possibility of Harris losing money pursuant to the lease. Harris can only realize a profit on the farming operations if the ranch is extremely profitable, because the first $1,675,000 of profit per year goes directly to Newport.

It is true that Rancho Sespe has made an average profit of only $300,000 a year before depreciation and lost an average of $200,000 a year after depreciation over the past 5 years. However, Lombard testified that 1978 was a very profitable year because prices for citrus products rose dramatically. No witness claimed that Rancho Sespe was not a good producing ranch. Several witnesses stated that costs were too high. Even if Harris were able to achieve all the economies he hopes for, perhaps $300 per acre, he would only cut expenses by $450,000 a year. Only higher prices, which are not related to labor, could raise profits high enough so that Harris could make money from the farming operations.

All the experts, including Jewett, indicated that costs in the pre-harvest operations could be cut substantially. Jewett testified that pre-harvest costs for growing navel and valencia oranges, avocados, and grapefruit range from $4-600 per acre in Ventura County, prior to depreciation and taxes. Lemons cost $7-900 per acre. Jewett also testified that most ranchers in the county have owned their ranches long enough so that their depreciation is not a major expense. From 1972-76, the ranch spent an average of about $1.5 million per year on pre-harvest operations, excluding taxes and depreciation, for a per acre average of roughly $1,000. The budget prepared by Harris in early January estimates pre-harvest expenditures of $624 per

acre, excluding taxes. Tables produced by the University of California Cooperative Extension, which were considered by Harris, indicate that costs in Ventura County are substantially higher than those estimated by Harris or Jewett. For lemons, the pre-harvest costs are $990 per acre. This figure does not include interest and management costs, as do the ranch figures. Such costs accounted for about $150 per acre on the average over the past five years. According to the University, the average production cost for valencia oranges is $825 per acre, again excluding management and interest. For avocados, the cost is estimated at $775 per acre, excluding interest. (R. Ex. C. pp. 3-5).

The second reason asserted by Harris for not considering the former workers for employment is his long standing adherence to "the management principle that operational difficulties will occur if a new owner initially hires some of the predecessor's employees." (Respondents' brief, p. 29). By reviewing ranch records and taking a short tour of the ranch, Harris determined that the operation needed to be changed. However, the problems alluded to by Harris in large measure concerned management decisions relating to irrigation, excessive equipment, frost protection, and non-cultivation techniques. Without having spoken to any of the former employees, Harris concluded that they would resist and be resentful of his changes. In support of the non-discriminatory nature of this decision, Harris testified that he had taken over four "failing" businesses in the last ten years where there had been no union activity, and that in each case he retained none of the predecessor's employees. One of the take-overs involved a packing shed with 80 employees. The other three were small citrus ranches with a total of perhaps ten full-time employees. Harris admitted that he was almost totally unfamiliar with the NPMS labor force and knew nothing of its productivity or wage scale. It is difficult to fathom how a prudent businessman could rely on a "management principle" based on a refusal to obtain relevant information about an obvious source of labor. For the legal sufficiency of such a defense, see pp. 45-46, *infra*.

Harris's third and (according to Respondents' brief) "most important" reason for hiring none of the former workers was that he had made a promise in the summer or fall of 1978 to a crew of Triple M workers that he would give them year-round work at Rancho Sespe if he obtained the packing contract. According to Harris, these were very productive workers who had been loyal to him during the four years that Riverbend had been operating in Ventura County. Harris's uncorroborated testimony about this promise is very weak. First, at the time he supposedly was speaking to the crew about Rancho Sespe he had no expectation whatever that Riverbend would be permitted by Watts to be the packer. Watts had already met Harris and decided to continue with the then current packing arrangements. Watts had told Pressutti of his decision. Second, Respondents' own records (GC Ex. 36) show that none of Rivcom's current employees began working for Riverbend prior to January 24, 1977, with the exception of two supervisors and a Fresno employee. Harris testified that these employees were working for Riverbend only six or seven months a year and sometimes did not work full weeks. When asked to identify the names of the workers on the list, Harris could name only the members of the Juan Bautista family. He was unable to point to any special skills of these employees except in the area of pruning. These skills, according to Harris, can be explained in 30 minutes. Most of the current Rivcom employees who worked for Riverbend did so for the first time in 1978.[17]

Finally, the brief claims that Harris decided to put his Riverbend workers to work at the ranch because the severe frost of

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[17] It is curious that fifteen of the Rivcom employees listed their address as 229 California Street, Santa Paula, while another twenty-four of the employees gave as their address either 410, 410½, or 412 Oak Street, Santa Paula. Harris testified that all of those persons with Ventura County addresses had lived there for some time. Yet, Juan Bautista, who lived at 229 California, stated that the men listing that address as their own had only slept in his house for a few nights.

December, 1978, deprived them of much of their work. This is an afterthought. There was no testimony that the frost affected any of the other Ventura County farms where Riverbend was doing harvesting work.

G. Rivcom's Decision to Demolish the Labor Camps.

Larry Harris arrived at the ranch office on the afternoon on January 16.[18] While reviewing ranch records, Harris learned for the first time that the labor camps which he had previously observed were used primarily for housing the agricultural employees of the ranch. Harris had "certain assumptions" about who lived in the camps, but he didn't know for sure until he was told by Claude Lee, an NPMS office employee. Harris also learned that under the terms of the licensing agreement between NPMS and the fromer employees, the employees' right to remain in the housing could be terminated on 24 hours' notice. (GC Ex. 34, Exhibit "B"). Harris decided that he would not be needing the housing for his employees and therefore decided to evict the residents, tear down the housing, and use the land for planting citrus and vegetables. Harris telephoned Telford who, on behalf of Newport, gave Harris permission to demolish the housing. Telford and Harris both testified that the subject of housing had not arisen during the negotiations. Apparently, this was the first discussion between the two men about the labor camps. On January 16 or 17, Harris prepared and delivered to each of the residents an informal notice requesting them to vacate the premises by February 16. (GC

Meanwhile, at least twenty of the employees have been living in the basement of the Rivcom office at the ranch, assertedly because of fear of retaliation from UFW supporters. It was not explained why these men chose to live apart from their families for several months, if indeed they were Ventura County residents.

[18] The brief, p. 50, states that Harris did not arrive until January 17 or 18.

Ex. 6).[19] On January 25, Rivcom served formal 30 day notices on the residents of the camps. (GC Ex. 7 & 9). At least two unlawful detainer cases have been filed against the residents and are currently pending in Ventura County Municipal Court. (GC Ex. 34 & 35).

H. The Agricultural Enterprise Since January 16.

Since taking control of ranch operations on January 16, Harris has continued the ranch as a citrus and avocado operation.[20] Harris has, however, made some operational changes and plans more for the future. When testifying about the reasons he was unable to take the time to consider any of the former employees for jobs, Harris testified that the onerous terms of the lease made rapid changes imperative. When testifying about why he had not actually been able to implement many changes between January 16 and early April, Harris testified that he took over the ranch in winter when activities are necessarily curtailed by cold weather and rain and that not much work can be done at that time of year. Besides, many of the Triple M employees were on vacation in January.

1. The Work Force.

None of the NPMS agricultural employees working at the ranch on and prior to January 16 has been hired by any of the business entities currently performing agricultural work at the ranch. The present agricultural employees, some employed by Rivcom, and some on the payroll of Triple M, have, with a few possible exceptions, worked in enterprises controlled by Larry Harris prior to their employment at the ranch.

Although Respondents' brief, p. 52, states that "Mr. Harris's entire work force arrived at the ranch on January 17",

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[19] The unlawful detainer complaints filed by Rivcom allege that these notices were delivered "on or about January 16". See GC Ex. 34, paragraph 13.

[20] The one acre of macadamia nut trees has been removed.

Harris's pruning techniques differ somewhat from those used by Lombard, in part because Harris wants the trees to produce larger fruit, which is desired in the Japanese market. The amount of pruning may be somewhat greater than under Lombard and different kinds of saws may be used. According to Harris, about 30 minutes of instruction is required to teach a worker the fundamentals of this method of pruning. Harris also plans to remove alternate trees in areas where the trees have become crowded together. Lombard also practiced tree removal. Both use mechanical side hedging equipment.

Harris intends to plant geraniums, vegetable row crops, and Satsuma oranges on the property where no trees are presently planted. One of these areas is 160 acres of river bottom land which was under lease and did not come into Rivcom's possession until May.

Harris also intends to plant crops on the land currently occupied by the labor camps. Respondents' expert witnesses testified that they would also do away with employee housing because farmers should not be in the housing business. Mike Jewett would also phase out the housing, but not immediately. (TR XIII, 177).[2] Jewett had two reasons for his opinion that the labor camps should be phased out: first, that home ownership is better for employees than renting, and second, that maintenance of the camps is an expense that other growers do not have to bear. Because the ranch is the largest in the county, Jewett could not compare it with other operations. Lombard stated that the camps were maintained because resident harvest labor is less expensive than harvest labor obtained through a contractor. He cited comparison costs, but no documentary evidence was offered by any party on this issue.

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[2] Respondents' brief, p. 65, overstates Jewett's testimony, claiming that he said elimination of the labor camps would be one of his first actions.

Rivcom's records demonstrate that only eight non-supervisory employees were hired by Rivcom during its first week of operation. (GC Ex. 36). As Harris testified, "You have to remember January 16th is a period of time when harvest is at one of its low points, and many people were gone on vacation, et cetera . . . . As people came back, we have had work in both locations (apparently the ranch and other Ventura County growers), and we have tried to adequately use our people in all locations as best we can." (TR XVI, 95). And: "it's been my intention to try to put together an orderly work force and have uniform employment." (TR XVI, 93-94).[21]

2. The Business Relationships Among Rivcom, Riverbend, and Triple M at the Ranch.

Riverbend is a corporation headquartered in Sanger which is engaged in the packing and marketing of citrus. It is under the management and control of Larry Harris, its President, who makes all management decisions. Riverbend, as part of its contractual arrangement with many of the growers it serves, often provides harvesting crews. Riverbend will also provide for the hauling of the fruit to its packing facilities in Sanger. Riverbend typically advances harvesting and hauling costs to the growers; Riverbend is reimbursed for these costs out of the sale of the fruit. When Riverbend provides harvesting and hauling services, it uses a labor contractor/custom harvester to do the actual work. In the case of the ranch, as well as in many other instances in the past five or six years, Riverbend has contracted with Triple M to perform the harvesting and hauling duties. At the ranch, Triple M also does some pruning work, sharing those tasks with Rivcom employees.

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[21] Respondents' brief states that: "(e)very one of these Rivcom employees had worked previously for Mr. Harris on an average of approximately two years", when, in fact, not a single employee from Ventura County had worked for Harris that long. Most had worked for Harris for the first time in 1978. (GC Ex. 36).

Triple M is a company holding a farm labor contractor's license. It is headquartered in Fresno. Aside from the ranch, it also provides such services under contract with Riverbend at approximately two other locations in Ventura County. Triple M provides nearly all the equipment required to harvest and haul citrus, including some large, heavy, and expensive machinery and trucks. Triple M bills Riverbend for its services in three categories: Harvest, support services (equipment), and hauling. Triple M's President, Benny Martinez, is the company's only supervisor. He visits Ventura County one to three times a week.

Rivcom is a wholly-owned subsidiary of Riverbend. Its president, Larry Harris, has full management and control of the company. It has no business outside of the ranch. Rivcom is headquartered in the Riverbend office. Both companies use the same computer for their record keeping and bookkeeping. Rivcom has entered into a contract with Riverbend to provide the same kinds of services as Riverbend provides to other growers. The contract was signed, for both corporations, by Harris. Day-to-day activities at the ranch are currently conducted by Harris and Alvin Long, a former Riverbend employee. Harris testified that Long was one of those who instructed Rivcom employees in purning techniques and had responsibilities in supervising agricultural work. Harris also stated that Eddie Franco and Danny Martinez, both Rivcom supervisors, oversaw Rivcom employees doing pruning work. Long testified that he had never been involved in purning work and that Franco and Martinez hadn't either.

On paper, there is a rather neat division of responsibilities among the three entities. But the ranch is not run on paper. In practice, there is a well-integrated enterprise. Harris, for example, has the authority to hire, fire, suspend, lay off, recall, promote, discharge, assign, reward, and discipline agricutural employees on the Triple M payroll while working at the ranch. At least, that is the testimony of Long under questioning by Respondents' counsel. (TR VII, 75-76). Harris, under questioning by Respondents' counsel, denied that he had any

such authority over Triple M employees. He did testify, however, that employees of Riverbend's field department direct Triple M employees while they are harvesting. The field department tells the harvesters where to pick and which fruit to pick. Harris testified that this is a common practice in the industry. See also *Corona College Heights Orange and Lemon Association*, 5 ALRB No. 15 (1979). Harris has also given Martinez authority to hire employees for Rivcom. (TR XVI 90, 92). And, Harris and Martinez have agreed on the importance of providing all the employees working at the ranch with full-time jobs. So, Martinez also has the authority to transfer Rivcom employees to the Triple M payroll (TR XVI, 127-128). Employees are also transferred from the Triple M payroll to the Rivcom payroll if such a move is necessary to give all employees sufficient work. These transfers are bookkeeping matters generally handled by Martinez and Long. Harris ran into repeated difficulties during his testimony while attempting to explain how the activities of the three entities are kept formally separate. Finally, he testified that: "They operate in similar fashion, since we're using common people and things—" (TR XVI, 104). When asked what he meant, Harris replied: "Well, all I was referring to is that there is a relationship which is very obvious between all of those entities. . ." (TR XVI, 106). Almost all of the members of the crews working at the ranch, regardless of which payroll(s) they are working under, were referred to continually by Harris as "our employees," "Riverbend employees," and as the Ventura County crew which had been doing such a good job for Riverbend.

3. Changes in Operations

Respondents' central contention about management practices under Lombard is that the ranch was run in an outmodeled, labor-intensive, and even extravagant manner. Harris testified about a number of changes he has already made or will soon implement in an effort to save labor and money. Several expert witnesses called by Respondents testified about changes they would advise.

As an example of Lombard's failure to adopt modern farming techniques, Harris repeatedly mentioned Lombard's reliance on mechanical cultivation, as opposed to the use of pre-emergent herbicides which sterilize the soil, for weed control. In coming to this conclusion, Harris relied upon page 45 of Respondents' Exhibit C, which Harris felt accurately represented conditions of the ranch. Page 45 indicates that only 22.7% of the acreage is still being cultivated. This chart corroborates Lombard's testimony that the majority of the ranch was already using non-cultivation techniques and that cultivation was only practiced on the steepest areas of the ranch for soil conservations reasons.

Another major change, which will take an unspecified amount of time to complete, is conversion of the irrigation system from a high water volume operation using a furrow method, to a low volume system of sprinkler (some equipped with spitters) and drip irrigation. Currently more than 60% of the ranch uses high volume irrigation. Lombard would also have converted the irrigation system if he had had more working capital. He was involved in converting some acreage each year. Low volume irrigation is more economical than is high volume and is less labor intensive.

Frost protection is a requirement each winter. The ranch has used an extensive system of orchard heaters known as smudge pots, in the past. This is an effective method, but it is labor intensive and requires the use of ever more costly oil. During the severe frost in January, Harris used the smudge pots. But, he is now in the process of selling them and, by next winter, will install wind machines. Wind machines are cheaper and require less labor to operate then smudge pots.

Under Harris's direction, some changes will be made in harvest practices. Using the same type of mechanical topping equipment as the predecessor, Harris will cut the trees somewhat lower. He will use fork lifts instead of straddle forks in the harvest, which he claims will make the work more efficient. Harris plans to pack the avocados in the field, rather than sending them to a packing house.

Rivcom has sold, or will sell, most of the equipment it acquired from the predecessor. The experts agreed that the amount of equipment used was excessive. Harris testified that he will no longer use the laboratory or the maintenance shop. Instead, he will contract with other businesses for repair work. He has already contracted for pest control work.

DISCUSSION, ANALYSIS, AND CONCLUSIONS

I. Jurisdictional Issues

A. Riverbend's Status as an Agricultural Employer

Section 1140.4 (c) of the Act defines the term "agricultural employer," which:

> shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee . . . and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

The undisputed evidence in this case indicates that both Riverbend and Rivcom have contracted with Triple M, a licensed labor contractor, to supply agricultural employees to perform work at the ranch. Respondents argue that Triple M functions as something more than a labor contractor, namely as a custom harvester, and as a result Triple M should properly be considered the employer of the persons on its payroll.[2]

In support of their position, Respondents rely principally on two Board cases, *Kotchevar Brothers*, 2 ALRB No. 45 (1976), and *Napa Valley Vineyards*, 3 ALRB No. 22 (1977). In *Kotch-*

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[2] Respondents also argue that Riverbend cannot be an agricultural employer because it has no agricultural employees. The circular nature of this reasoning is too clear to require comment.

evar, the Board found that a custom harvester who supplied costly equipment, transported the picked grapes to market, and supplied a complete harvesting service should be considered the agricultural employer even though he was also performing functions traditionally associated with those of a farm labor contractor.

In *Napa Valley*, the Board elaborated on its reasoning in *Kotchevar*, and held that the "whole activity" of a labor contractor must be analyzed in determining whether the contractor is the employer of the employees on its payroll. The Board specifically relied on regulations promulgated pursuant to the Fair Labor Standards Act in making this determination.

In *Corona College*, *supra*, the Board found that a citrus packing house was the employer of harvesting crews, even though the employees were on a payroll of a different entity, because packing house supervisors directed the work of the crews.

In a very recent case, *Joe Maggio, Inc.*, 5 ALRB No. 26, (1979), the Board held that a harvester who supplied expensive equipment and set the wages of his crew members was nonetheless not the agricultural employer of those employees under the Act. The Board again looked to the whole activity of the employer and refused to regard the supply of equipment, the setting of wages, or any other single factor as determinative of the issue.

Turning to the facts of this case, it is apparent that while Triple M is something more than a mere labor contractor, it is also something less. Triple M's only supervisor, Benny Martinez, works primarily in the San Joaquin Valley. He visits the ranch one to three times a week. As in *Corona College*, the actual work of the harvesting crew is supervised by members of Riverbend's Field Department. Riverbend is vitally concerned with the quality of picking. But Riverbend's relationship to the employees is much stronger than that existing between the packing house and the employees in *Corona College*. Alvin Long, Rivcom's second-in-command, testified that

Larry Harris had the authority to act, in effect, as a Triple M supervisor. Further, Harris selected the Triple M crew which he wanted to come to work at the ranch and many workers on the Triple M payroll also work at times on the Rivcom payroll where Harris's authority is unquestioned. In practice, Martinez supplies his crews with harvesting equipment, provides for transporting the fruit from Harris's farm to Harris's packing house, and leaves the day-to-day supervision to Harris. Triple M's billing categories recognize the distinct aspects of its services. Harris consistently testified that he wanted a unified work force at the ranch. To achieve this end he and Martinez arranged for transfers from one payroll to another. As a result, Harris has and exercises the authority to place Rivcom workers on the Triple M payroll when harvesting needs to be done and the reverse when it is time to prune.

Considering the "whole activity" of Triple M at the ranch, it is clear that, despite Martinez's ability to supply expensive equipment and the fact that he sets the wages of Triple M employees, it is Harris, acting as Riverbend, who controls the work of the Triple M crews. I conclude that Riverbend is an agricultural employer within the meaning of Section 1140.4(c) in relation to agricultural employees working on the ranch on the Triple M payroll.

B. Riverbend and Rivcom as Joint Employers

In determining whether two nominally separate entities should be treated as a single employer, the NLRB and the Board have looked to the following factors: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership and control. See *NLRB* v. *Transcontinental Theaters, Inc.*, 568 F.2d 125 (9th Cir., 1978); *Abatti Farms, Inc.*, 3 ALRB No. 83 (1977).

Harris originally wanted to limit his relationship with the ranch to that of a packer and marketer of its citrus. He would have been able to carry out that function through Riverbend alone. Newport's founders wanted Harris to farm the ranch as well. He agreed and decided to sign the lease as President of

Rivcom, a corporation founded for non-agricultural purposes. Harris is President of both corporations. All of Rivcom's stock is owned by Riverbend. Harris is responsible for all management decisions of both corporations.

Riverbend supervises the work of the Triple M crews. Respondents point out that this practice is no different from Riverbend's relationship with its other "outside" growers. But Rivcom is not an "outside" grower. It is simply a legal entity under Harris's control which is operating for Riverbend's benefit. Rivcom's only function is the performance of certain pre-harvest activities for the purpose of supplying fruit to Riverbend. Harris is able to transfer employees from the Riverbend work force to the Rivcom payroll and back at will. This ability is not merely potential; it has been exercised often since January 16. Harris repeatedly emphasized that he wanted a unified work force at the ranch.

Riverbend and Rivcom are located in the same building in Sanger. They utilize the same computer system for accounting, and payroll functions. All that differentiates them is an employer number on the computer's program.

Under applicable precedent, Riverbend and Rivcom must be considered to constitute a single, joint employer. To hold otherwise would give undue weight to mere legalisms. From the employees' point of view, a finding that Riverbend and Rivcom are separate employers would require two representation elections, and the possibility of two bargaining relationships. In effect, contrary to the Act's mandate that there shall be a single bargaining unit for each employer, the workers at the ranch would be divided into a harvesting unit and a pre-harvest unit. Such a result would be contrary to clear legislative intent. I therefore conclude that Riverbend and Rivcom are joint employers in their operations at the ranch.

C. The Section 1153(c) Issues.

The General Counsel has alleged that Respondents violated Section 1153(c) of the Act by: (1) arranging for NPMS to

discharge the former agricultural employees of the ranch; (2) refusing to hire any of the former employees; (3) attempting to evict the former employees from their ranch housing; and (4) contracting out work previously performed by the former employees.

1. The Discharges of January 16.

It is undisputed that NPMS, through a vice-president, Charles McBride, discharged all of its employees on the morning of January 16, the day PIC sold the ranch to Paraships. There is no evidence of any communication between NPMS and Respondents prior to the discharges. Nor is the fact that NPMS terminated its employment relationship suggestive of any collusion with Respondents. Since NPMS was no longer farming the ranch, it had no work for its employees. The General Counsel's argument that McBride was acting as Respondents' agent under Section 1165.4 of the Act is presented without any serious analysis. Merely because it is possible for a person to act as an agent of another even if he is not the principal's employee does not lead to the conclusion that agency can be established when the principal and putative agent have never met. The allegation that Respondents are responsible for the discharges shall be dismissed.

2. The Refusals to Hire.

Larry Harris decided, for reasons which will be examined later, not to hire any of the former employees of the ranch. He reached this decision shortly before becoming Newport's lessee, and without giving any consideration to the skills and experience of the former employees. As early as January 18, Respondents were on notice that the former employes desired to continue working at the ranch. A formal written demand was made by the UFW and was received by Respondents on January 19. Rivcom's own records (GC Ex. 36) establish, contrary to Harris's testimony, that only twelve non-supervisory employees had been hired by January 19. Of these, five had been brought from the Fresno area by Earl Hall, a business

associate of Harris's. Rivcom hired approximately sixty employees after January 20, yet it never responded to the UFW's request that the former employees be hired. Respondents' only direct communication to the UFW (GC Ex. 5) merely refused to recognize it as the bargaining agent of Rivcom's employees. It made no refrence to the hiring issue.

The most definitive interpretation of the evidentiary burden which the General Counsel must meet to establish a violation of Section 8(a)(3) of the NLRA, which is virtually identical to Section 1153(c), can be found in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

In adopting this formula the Supreme Court did not eliminate the elements of anti-union motivation and intent to encourage or discourage union membership as requisites of a Section 1153(c) violation, but rather held that "some conduct . . . may be deemed proscribed without need for proof of an underlying motive. That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent'." 388 U.S. at 33.

It is clear that Respondents were under no obligation to hire any of the NPMS employees, *NLRB* v. *Burns International*

Security Services, Inc., 406 U.S. 272 (1972), but "it is well settled that (the NPMS) employees were entitled to be considered for employment with (Respondents) on a nondiscriminatory basis." *Tri-State Maintenance Corporation* v. *NLRB*, 408 F.2d 171, 174 (D.C. Cir., 1968). In *Columbus Janitor Service*, 191 NLRB 902 (1971), the NLRB held that an employer who had taken over a business enterprise violated Section 8(a)(3) "for refusing to *consider* and employ the former" employees. (emphasis added). In *Columbus Janitor*, the new employer interviewed applicants at the State Employment Service without informing the former employees or their bargaining representative. The Trial Examiner found this conduct to be "inherently destructive of important employee rights" and also discounted the Respondent's defense that it preferred to bring in a new work force because the former employees would be resistant to different work methods. "The apocryphal character of such claim is self-evident for the Respondent did not interview a single Allied employee." 191 NLRB at 911.

Respondents cite *Southline System Services, Inc.*, 198 NLRB 449 (1972), and *Industrial Catering Company*, 224 NLRB 972 (1976) for the proposition that it is not unlawful for an employer who takes over a business to prefer his own employees to those of his predecessor. To the extent that the new employer had substantial business reasons for such a preference, Respondents' contention is accurate and unexceptionable. But in both cases cited by Respondents the new employer informed the predecessor's employees that they were welcome to apply for jobs and would be considered. Respondents seem to understand that they were under a duty to consider the NPMS employees for jobs when they argue, incorrectly, that there were no positions available by the time the UFW first requested that the former employees be hired.

I find that Respondents' refusal to consider the NPMS employees for jobs was inherently destructive of their rights under the Act. Respondents' refusal to interview any of the former employees or to even respond to communications made

on their behalf by the UFW must have had the effect of discouraging union membership, especially since Respodents had no difficulties in communicating quickly with the former employees through the medium of eviction notices.

Because Respondents have treated all the former employees as a group, I find that it is not necessary for the General Counsel to establish that each alleged discriminatee made a proper applications. See *Kawano, Inc.*, 4 ALRB No. 104 (1978), and cases cited therein. This finding is also dictated by the fact that Respondents did not use application forms for hiring agricultural employees and that, in any event, the existence of such application forms was not made known to the former employees by the Respondents. As far as Respondents' knowledge of the former employees' union affiliation is concerned, Harris conceded that he was aware during 1978 that the UFW had won a Board representation election at the ranch. The transfer documents between PIC and Paraships and Paraships and Newport demonstrate unequivocally that there was knowledge on the part of all parties that the UFW had been certified as a result of the election. Respondents' studied insistence throughout the hearing and in the brief that they had no "official knowledge" of the UFW certification, that such certification was in any event irrelevant to Harris, and that Harris never thought to ask Pressutti or Telford or anyone else about his informal knowledge of the representation election is simply not credible. Surely Newport's attorneys read the transfer documents entered into by PIC and Paraships. And surely they passed the information on to their clients.[24] Richard Strong's testimony establishes that Ken Manock, Newport's attorney, was aware of the certification.

The failure of Respondents' witnesses to admit their knowledge of the certification tends to weaken generally the credibil-

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[24] As Judge Leventhal noted in *IAM* v. *NLRB*, 414 F. 2d 1135, 1139 (D.C. Cir., 1969). "The purchaser of a business does not take title unencumbered by the labor relations obligations of his predecessor. He is well advised to analyze labor title as much as real title."

ity of their testimony. It also tends to establish the opposite of the testimony, that is, that Newport and Respondents deliberately denied knowledge of the certification in an effort to camouflage their anti-union motivations. *Hemet Wholesale*, 3 ALRB No. 47 (1977), ALO Decision, pp. 19-20.

As noted earlier, Respondents have asserted various business justifications for their refusal to consider or hire any of the former employees. Respondents' major contention, namely that it was necessary, because of the onerous conditions of the lease to make rapid and drastic changes in operations at the ranch, therefore making it impossible to look into the possibility of hiring the former employees, is refuted both by the lease and by Harris's testimony. The lease, as modified, cannot properly be characterized as onerous. It is drafted in such a manner that Harris is protected against any and all losses. Rental payments may never exceed profits and if there are no profits there is no required rental payment. Respondents' own witnesses, Macklin and Jewett, testified that a reasonable person would not have leased the ranch with a minimum rental of $1.7 million annually. Macklin said that a person would be "off his gourd" (TR XI, 204) to buy the ranch with a $1 million annual mortgage. Jewett said he would not sign such a lease because historically earnings would not support it, but that Harris might be in a different position because of his ability to market the fruit. Presumably Jewett took his proposed hypothetical operating changes into effect in coming to his expert opinion. Even a $300 per acre cut in costs would only result in a $450,000 savings.

Even if the lease agreement could be considered onerous, there is no indication that Harris was in a hurry to make changes. He testified that it was impossible to do everything in a year and, more significantly, that little could be done except for planning during the cold, winter months. Indeed, the inability to make quick changes is one of the major reasons cited by Respondents in arguing that proposed changes should be taken into account for purposes of the successorship issue in determining whether there has been a substantial change in the agricultural enterprise.

Two of Respondents' business justifications, that Harris followed a management practice of not hiring former employees because they would resist new ways of doing things, and that Harris therefore decided to hire his own long-time loyal employees whom he could trust and who he had promised full-time employment, are opposite sides of the same coin. The first contention is, by its nature, irrefutable. But it must be rejected as a defense to an unfair labor practice charge. If it were to be accepted, Section 1153(c) would lose much of its force. Any employer could then decide that it, too, believed in the practice and therefore had no obligation to consider former employees because their very status as former employees would be an absolute bar to employment. Such a defense is simply not substantial enough to overcome the well-established labor law principle that all applicants for employment must be considered in a non-discriminatory manner. *Phelps Dodge* v. *NLRB*, 313 U.S. 177 (1941). It would indeed be ironic if experience, rather than being an asset to an applicant, were to disqualify him from further consideration. A similar defense was summarily rejected in *NLRB* v. *Foodway of El Paso*, 496 F.2d 117 (5th Cir., 1974). The new employer argued that it refused to hire any of the predecessor's employees because the business had been losing money. The court stated:

> We give little credence to the reason assigned—the loss of money—for the refusal to hire any of the non-supervisory employees. Reason dictates that the managerial employees, who were retained, not the rank-and-file employees who were fired, should be responsible. 496 F.2d at 119.[25]

In another case involving a successor employer's discriminatory refusal to hire the predecessor's employees, *NLRB* v. *Houston Distribution Service, Inc.*, 573 F.2d 260 (1978), the Fifth Circuit found that the successor's behavior toward the work force of the predecessor gave the NLRB reason enough

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[25] Harris has retained two of the NPMS supervisors as consultants on certain issues, but not as supervisors of agricultural employees.

to conclude that the successor failed to hire the employees as part of a plan to avoid bargaining with the union representing them. The Court noted that the successor ". . . never inquired about the quality of the workers, even though such inquiry could easily have been made." 573 F.2d at 264.

Respondents were, of course, free to favor their employees provided there were non-discriminatory and substantial business reasons for doing so. Harris's testimony on the reasons for his preference was even weaker and less convincing than his reliance on the burdensome lease requirements. Harris testified that he promised a group of his employees work at the ranch if he were to secure the right to pack the fruit. This conversation assertedly took place in the fall of 1978, a time when Harris had no reason to believe that he would eventually be permitted to be the packer of the fruit. Not one member of the crew to whom the promise was supposedly made was called to corroborate Harris's testimony. Over and over again Harris referred to the crew as his best, with long time, loyal employees, and as one with special skills. Yet, despite the fact that Harris testified that Riverbend had been harvesting fruit in Ventura County for four years, none of the Rivcom employees had worked for Riverbend for more than two years. A majority of the crew had worked for Riverbend for a single season. Respondents attempted through cross-examination of several NPMS employees to establish that they lacked skills which the Riverbend employees possessed, such as the ability to pick two-handed. Yet, Juan Bautista, the one Rivcom employee who did testify said that he had never seen harvesters pick two-handed. His testimony established that the NPMS employees and the Rivcom employees were involved in the same general practices, even if the style of pruning and picking differed in details. Finally, although Harris was lavish in praise of the crew, he could identify only a handful of its members by name and was clearly unfamiliar with their individual skills. In sum, the record does not substantiate the claim that Harris was motivated to favor this crew over the former employees because of their skills, their long-time service, or a promise made to give them work at the ranch.

There was testimony by Lombard on the final day of the hearing ranking last winter's frosts among the worst of the century. Respondents now assert that Harris gave work at the ranch to Riverbend harvesting employees because the frost reduced the amount of work available to them elsewhere in the county. There is no evidence whatever to support this contention. Its inclusion in the list of business justifications appears to be pretextual.

In addition to these reasons for preferring their own employees, Respondents claim that they did not respond to the UFW demand that they hire the former employees because the demand was couched in all or nothing terms. Since the UFW was seeking employment for 130 people, and Respondents had far fewer available jobs, Respondents reason that there would be no point in considering the former workers. It is true that the UFW asked for the reinstatement of all the workers. It would have been rather unusual for a union to have asked that only half or a quarter of the employees be hired. It is certainly not unusual for a party to any negotiation to start by asking for everything. Whether the UFW and the former employees would have refused anything less than jobs for everybody is an untested hypothesis. The fact that reinstatement was initially sought for all the former employees cannot justify Respondents' refusals to consider them for employment on an individual basis, especially since Respondents made no effort to try to clarify the UFW's position. Harris also testified that he saw no reason to respond to the UFW mailgram because an unfair labor practice charge had already been filed. Certainly, Harris could not have believed that the filing of a charge was a bar to voluntary settlement or a defense to violation of the law.

Taken singly and together, Respondents' asserted business justifications for refusing to consider or hire the former employees do not establish that they were motivated by legitimate and substantial objectives. I conclude that in refusing to hire the former agricultural employees of NPMS, Respondents violated Sections 1153(a) and (c) of the Act.

3. **The Evictions.**

The same legal principles discussed in relation to the hiring matters govern resolution of the evictions issue. On or about January 16, in its only direct communication with the former employees, Rivcom served informal eviction notices on all the residents of the labor camp. Harris testified that he only became sure that the residents of the camps had been employees of NPMS when he arrived at the ranch on the 16th. Yet, one of his first orders of business was to start proceedings to have the tenants evicted. It is undisputed that housing was provided to the former employees by NPMS as a condition of employment. Rivcom attached the licensing agreement between the employees and NPMS as an exhibit to its unlawful detainer complaints.

An employer's attempt to evict employees from housing provided as a condition of employment may constitute a violation of Section 1153(c) of the Act if it is carried out discriminatorily to discourage union membership. *Kohler Company*, 128 NLRB 1062 (1960); *McAnally Enterprises*, 3 ALRB No. 82 (1977). Clearly, housing is a necessity, one perhaps even more important than employment. The eviction proceedings initiated by Rivcom, taken together with its refusal to consider any of the former employees for jobs, and in the absence of any communication other than the eviction notices themselves, are inherently destructive of important employee rights.

Respondents asserted several business justifications for the eviction attempts. First, Harris wanted to use the sixty or seventy acres of land under the housing to plant crops.[25]

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[25] Respondents' brief emphasizes that Harris did not even know that he would have control of the camps under the lease until the 16th. The brief considers the so-called "river bottom" land to be the land on which the camps stand. This is far from clear in the record. Watts referred to last-minute negotiations about the river bottom land but did not mention the labor camps. Talford testified that there was a dispute with Watts about the camps. Harris referred to the

Second, Harris and several expert witnesses testified that it was uneconomical to maintain housing for harvest workers when picking crews could be obtained from labor contractors. Third, Harris testified that problems in the water supply system made it virtually impossible to bring the camps up to applicable legal standards.

Harris's testimony about planting crops after removing the camps indicated that his plans were, at most, in a formative stage. By the time of his testimony, which took place in March and April, Harris had not yet sampled the soil or decided exactly what crops would be planted in what areas. He was decidedly more specific about plans to grow flowers and vegetables in the river bottom and golf course areas. This unsupported testimony does not explain the haste with which the decision to evict the former tenants was made.

According to ranch records, the housing cost NPMS about $70,000 a year. It is not clear if this figure took into account the rental payments made by the employees. The cost of the housing thus comprised roughly 3% of the ranch costs. It was Lombard's contention that the cost was more than compensated for by the lower costs incurred by hiring its own harvest crews rather than contracting for harvest labor. While Respondents introduced a substantial amount of documentary material concerning pre-harvest costs, there is nothing in the record to indicate that they considered whether worker housing might have made economic sense. One of the areas on which Harris and Lombard were in agreement was the desirability of having a permanent, year-round work force. According to Lombard, the housing was an aid in achieving that goal. It is

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river bottomland as 160 acres along the Santa Clara River which would be available for his use sometime in May. (TR XV, 141). It is clear that Harris considered the river bottomland and the labor camps to be distinct. But, if it were true that the status of the camps was in doubt until the last minute, it would be even more astonishing that Harris would be able to make reasoned business decisions of such magnitude at such a breakneck pace.

true that labor camp housing is rare in Ventura County. Only one other large citrus ranch provides employees housing. But there is only one other large citrus ranch in the county. Jewett testified that the ranch, because of its size, was in a class by itself.

It is far from clear that Harris considered the difficulty in meeting code requirements in his decision to evict the tenants. It appears that he first became aware of some difficulties in late January, only after he had served the first eviction notices. Nonetheless, his testimony on this issue was generally vague and sometimes untrustworthy. At his most specific, Harris stated that he had received two citations from the Ventura County Department of Environmental Health for water and sewage violations. Robert Gallagher, the sanitarian who investigated the problems, testified that only informal notices, rather than citations, had been issued. One notice required that an over-flowing septic tank be corrected. Rivcom quickly complied. The other notice required that the drinking water supply be separated from the agricultural water supply. When Gallagher telephoned Harris's attorney about a schedule for compliance, the attorney told him that Rivcom would send a letter stating that it had no intention of complying.

The testimony of Harris and Telford concerning the housing is, taken as a whole, inherently incredible. First, they testified that the subject of the labor camps never came up during their lease negotiations, even though some 150 housing units must have been at least as visible an asset as the ranch's pick-up trucks. Second, Harris testified that he gave little thought to the housing until he arrived at the ranch. Yet, within the space of twenty-four hours, he not only learned for the first time that the housing was occupied by the ranch's agricultural employees, but he also researched the ranch records to learn about the licensing agreement between NPMS and the employees, decided that he wanted to tear down the housing, contacted Telford by phone to get Newport's permission to remove the houses and their occupants, planned to use the land to plant certain crops, and drafted and served the informal eviction

notices. Either, contrary to the testimony, Harris had planned his actions in advance, or he had some very important reason to devote his first day to starting the eviction process, even though he was not about to begin planting crops in the immediate future.

While Rivcom may have had business reasons for wanting to raze the housing, none of the reasons asserted explains the speed with which the eviction process was begun. It is clear that the eviction attempts were motivated in substantial part by Harris's desire to remove from the ranch the former workers, whom he did not want as employees because of their union membership and the impact of their membership on the successorship issue. I conclude that the attempted evictions constitute violations of Sections 1153(a) and (c) of the Act. There was uncontradicted testimony that several retired employees continued to receive housing as a condition of their former employment. They also have received eviction notices. The effort to evict these former employees constitutes a violation of Section 1153(a) of the Act. *Kohler Company, supra.*

4. The Contracting Out of Work.

Rivcom has contracted with Riverbend to harvest and pack the fruit of the ranch, as well as to perform some of the pruning work. Riverbend has contracted with Triple M to provide the labor for this work. Because I have already found that Riverbend is the employer of the Triple M agricultural employees and that Riverbend and Rivcom constitute a single employer, this contracting of work does not constitute contracting with an outside entity. The only other contracting of work formerly performed by NPMS employees is a pest control agreement between Rivcom and a Ventura County company. Respondents' witnesses established that it is customary for such work to be done on a contract basis. The amount of labor used in pest control is so small that any possible anti-union motive would clearly be outweighed by Respondents' business justifications of economy and efficiency. I conclude that General Counsel has failed to establish that the contracting out of pest control work is in violation of Section 1153(c).

D. The Section 1153(e) Issues.

The General Counsel contends that Rivcom has succeeded to the bargaining obligations of NPMS under the Act by virtue of its taking over the farming operation at the ranch on January 16. Rivcom's admitted refusal to bargain with the UFW and its unilateral changes in certain working conditions, it is argued, are violations of Section 1153(e) of the Act.

NLRB precedent considers an employer who takes over a business to be a "successor" to the previous employer's collective bargaining obligations when there is substantial continuity in the enterprise. The NLRB and the courts have examined numerous factors in determining whether the new employer's operations demonstrate substantial continuity, but foremost among them is continuity in the work force across the change in ownership. *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972) and *Howard Johnson Co.* v. *Detroit Joint Board*, 417 U.S. 249 (1974).

In the present case, there is no continuity between the NPMS work force and the work force hired by Rivcom and Riverbend. It is well settled, however, that if the absence of work force continuity is caused by the new employer's discriminatory refusal to hire the predecessor's employees, then the work force element will be presumed to have been proved, for to hold otherwise would permit an employer to benefit from his own unfair labor practices. *NLRB* v. *Foodway of El Paso, supra; NLRB* v. *Houston Distribution, supra.*

Here, by failing to consider or hire any of the predecessor's employees, Respondents have violated Section 1153(c) of the Act. NLRB precedent requires that the work force continuity element of successorship by deemed satisfied under these circumstances.

Aside from the requirement that there be substantial continuity in the work force, the Supreme Court has avoided any mechanical tests in deciding whether a successor is bound to

the labor relations obligations of his predecessor. As Justice Marshall said in *Howard Johnson, supra:*

> Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, (and the absence of legislative guidance) . . . emphasis on the facts of each case as it arises is especially appropriate . . . 417 U.S. at 256.

> The real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue . . . There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. 417 U.S. at 262, f. 9.

In addition to identity of the work force, the most important factors the NLRB has taken into account in determining successorship issues in the industrial context are identity of product lines, similarity of job functions, and use of the same plant. *NLRB* v. *Burns, supra.* Here, Respondents have continued to operate the ranch as a producing citrus and avocado orchard. Rivcom has done more than merely lease some agricultural land; it has acquired the legal right to manage the growth of, and pick the fruit from, the trees on the property. Regardless of certain changes in operating methods in the production of the fruit from those trees, both those already implemented and those which have not yet been put into effect, Respondents are in the same business as was NPMS.

There have indeed been some changes in the methods of growing the fruit. Most of these involve a shift in emphasis rather than a radical break with past practices. For example, the predecessor used certain frost protection techniques; so does Rivcom. Rivcom will rely much more heavily on wind machines than orchard heaters, but a change of this type does not substantially alter the nature of the agricultural enter-

prise. Similarly, a greater emphasis on non-cultivation techniques, and low volume irrigation are the kinds of management changes which are routinely made by a new employer.[27]

Some of the proposed or implemented changes of Respondents may reduce the number of agricultural employee positions available, but they do not change the kinds of work which must be done to grow and pick the fruit. The changes in pruning and picking techniques are differences which are easily learned. Despite Respondents' arguments to the contrary, there is no evidence that a specially trained breed of farm worker is required to do the work in the way desired by Harris. The record indicates that for the most part, the employees, past and present, pruned and picked using similar equipment. Harris simply wants the pruning to shape the trees somewhat differently. I find that the agricultural enterprise at the ranch is substantially the same under Rivcom's management as it was under the predecessor's regime.[28]

Respondents also argue that, even if they are successors to NPMS's bargaining obligations under NLRB precedent, they are barred from recognizing the UFW by the terms of Section 1153(f) of the Act. Section 1153(f) provides that it shall be an unfair labor practice for an agricultural employer "to recognize, barain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of" the Act. Respondents reason that the UFW has not been certified as the representative of Rivcom's employees and

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[27] Cf. *NLRB* v. *Foodway of El Paso, supra*, where the court reviewed twenty-four changes which the Respondent argued removed it from successorship doctrine. The court characterized these changes as routine. They are of the same order as the change made or planned by Respondents herein.

[28] Respondents do intend to grow crops such as pumpkins, vegetable row crops, and flowers which have not been grown on the ranch previously. The acreage involved, however, is insufficient to affect the overwhelming predominance of citrus.

that the prohibition embodied in Section 1153(f) is therefore applicable.

The Board has been called upon to interpret Section 1153(f) once before, in *Kaplan's Fruit and Produce Co., Inc.*, 3 ALRB No. 28 (1977). In that case, several employers argued that a literal reading of Section 1153(f) prohibited them from continuing to bargain with labor organizations once their initial 12 month certification had ended. In rejecting this argument the Board noted that such an interpretation would run counter to the "Act's central purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state, Section 1, ALRA." One of the policy considerations against a restrictive interpretation of Section 1153(f) examined by the Board in *Kaplan's* applies with equal force here:

> "(T)his theory seriously impairs the employees' right to be represented in their relationship with employers. If, as will often happen, certification lapses when the employer has just passed his peak season, the effect would be to preclude the possibility of *any* representation for employees until the following peak season, when the entire election process would have to begin again. 3 ALRB No. 28, at 6. (Emphasis in original).

Respondents' interpretation of Section 1153(f) would prohibit any application of the NLRB successorship doctrine. The legislature could not have intended such a result. As the Board noted in *Kaplan's*:

> The prohibition against an employer's recognizing an uncertified union is clearly directed, not towards an arbitrary time limit on bargaining, but towards preventing voluntary recognition of labor organizations. The facts in *Englund* v. *Chavez*, 8 Cal. 3d 572, are too much a part of the history leading to the enactment of the ALRA for us to consider 1153(f) as anything but a guarantee of freedom of choice to agricultural employees through the machinery of secret ballot elections. The prohibition against bargaining with an uncertified union does not and should not preclude bargaining with a union that has been chosen through a secret ballot election. 3 ALRB No. 28 at 7.

Here, the employees of the predecessor chose the UFW as their bargaining agent in an election conducted by the Board. Within the twelve month period following the certification, there is an irrebuttable presumption that the union's majority status continues. *Section 1156.6 of the Act.* If the other requirements for successorship to the predecessor's bargaining obligations are met, Section 1153(f) is not a bar. In these circumstances the original certification must be deemed to be amended to name the new employer. I conclude that by their admitted refusal and failure to bargain with the UFW Respondents have violated Section 1153(e) of the Act.

The General Counsel also argues that certain unilateral changes in working conditions made by Respondents, namely the contracting out of work to Triple M and the pest control company, and the attempted evictions, without giving the UFW notice and an opportunity to bargain, constitute additional violations of Section 1153(e). While conceding that the Supreme Court held in *Burns, supra,* that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor . . .", the General Counsel argues that this right does not extend to cases in which the successor attempts to evade its bargaining obligation by the unfair labor practice of discriminatorily refusing to hire the predecessor's employees. I agree that Respondents' Section 1153(c) violations, which were committed to avoid the duty to bargain with the UFW, require that Respondents not be permitted to make unilateral changes in those conditions of employment which are the subject of the Section 1153(c) violations. To hold otherwise would deny the discriminatees any effective remedy.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 1153(a), (c), and (e) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondents be ordered to offer employment to each of the former NPMS agricultural employees named in Appendix A to the First Amended Consolidated Complaint. If there are not sufficient positions available at the ranch for agricultural employees on the Rivcom, Riverbend, or Triple M payrolls, to hire each of the named persons immediately, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. The order of names on the preferential list shall be determined pursuant to a non-discriminatory method approved by the Regional Director of the Board's Salinas Regional office.

I further recommend that Respondents make whole each of the persons listed in Appendix A to the First Amended Consolidated Complaint by payment to them of a sum of money equal to the wages they each would have earned but for Respondents' unlawful refusal to hire them, less their respective net earnings, together with interest thereon at the rate of seven per cent per annum. Back pay shall be computed in accordance with the formula established by the Board in *Sunnyside Nurseries, Inc.*, 3 ALRB No. 42 (1977). The UFW sought employment for each of the former workers in a communication to Rivcom dated January 18, 1979. Because Respondents never responded to this communication, I find that each of the former employees applied for work on January 18. The amount of back pay due each person shall be determined pursuant to the guidelines set forth by the Board in *Kawano, Inc., supra.*

I shall further order that Respondents notify their employees that they will, upon request, meet and bargain in good faith with their certified collective bargaining representative, the UFW. Pursuant to Board precedent in *Adam Dairy, dba Rancho Los Rios*, 4 ALRB No. 24 (1978), and *Sunnyside Nurseries, Inc.*, 5 ALRB No. 23 (1979), I shall order that Respondents bear the costs of the delay which has resulted from their failure and refusal to bargain with the UFW, by making whole their employees for any losses of pay and other economic losses

which they may have suffered as a result thereof, for the period from January 18, 1979, until such time as Respondents commence to bargain in good faith and continue so to bargain to the point of a contract or a bona fide impasse. The Regional Director for the Salinas region will determine the amount of the make-whole award in accordance with the formula adopted by the Board in *Adam Dairy, supra*, as modified in *Sunnyside, supra*. The General Counsel omitted a request for a make-whole order in the First Amended Consolidated Complaint and did not seek to amend the Prayer to include such a request until the last day of the hearing. Respondents argue that, had they been aware of the possibility of a make-whole order, they would have presented additional evidence to the effect that some of Rivcom's employees had threatened Rivcom with an unfair labor practice charge pursuant to Section 1153(f) of the Act, if it were to recognize the UFW. While the request should have been included in the original complaint, the fashioning of remedial orders lies solely within the discretion of the Board. Here, Respondents refused to consider any of the former employees in an effort to avoid their bargaining obligations with the UFW. Even if Respondents believed in good faith that Section 1153(f) barred them from recognizing the UFW, reliance upon an erroneous view of the law does not constitute a defense. *Kingsbury Electric Cooperative, Inc.* v. *NLRB*, 319 F.2d 387 (8th Cir. 1963). Respondents have not established that an exception should be made in this case to the Board's general rule that employers who refuse to bargain in good faith should be required to make their employees whole for any economic losses they have incurred as a result.

In order to insure that there will be an effective remedy for Respondents' discriminatory refusal to hire the former employees and for Respondents' discriminatory efforts to evict the former employees from housing provided to them as a condition of their employment, I shall specifically order that Respondents not make any unilateral changes in the terms and conditions of employment, including any further effort to evict the former employees, until good faith bargaining about these

subjects with the UFW has commenced and agreement or a bona fide impasse has been reached.

ORDER

Respondents Rivcom Corporation and Riverbend Farms, Inc., their officers, agents, representatives, successors and assigns shall:

1. **Cease And Desist From:**

a. Discouraging membership of employees in the UFW or any other labor organization by unlawfully refusing to hire the former employees of National Property Management Systems, dba Rancho Sespe, by attempting to evict, or evicting, those employees from housing at Rivcom Ranch provided them as a condition of their employment by NPMS, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c);

b. Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondents' agricultural employees at Rivcom Ranch;

c. In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmation actions which are deemed necessary to effectuate the policies of the Act;

a. Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of their agricultural employees at Rivcom Ranch, and if an understanding is reached, embody such understanding in a signed agreement;

b. Make whole their agricultural employees for all losses of pay and other economic losses sustained by them as the result

of their refusal to bargain, in the manner set forth in "The Remedy";

c. Immediately offer the persons named in Appendix A to the First Amended Consolidated Complaint employment in their former or substantially equivalent jobs and make each of them whole for any losses he or she may have suffered as a result of his or her failure to be hired, in the manner set forth in "The Remedy";

d. Refrain from unilaterally altering the terms and conditions of employment of their agricultural employees, including any effort to evict any of the former employees of National Property Management Systems, dba Rancho Sespe, from their housing at Rivcom Ranch, without first bargaining in good faith with the UFW about such proposed changes and either reaching agreement with the UFW or arriving at a bona fide impasse;

e. Preserve, and upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due their employees under the terms of this Order;

f. Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondents shall thereafter reproduce sufficient copies in each languages for the purposes set forth hereinafter;

g. Post at Rivcom Ranch copies of the attached Notice for 90 consecutive days at times and places to be determined by the Regional Director;

h. Provide a copy of the attached Notice to each employee hired during the 12-month period following the issuance of this Order;

i. Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order to all employees named in Appendix A to the First Amended Consolidated Complaint;

j. Arrange for a representative of Respondents or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondents on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period;

k. Notify the Regional Director in writing, within 30 days from the date of issuance of this Order of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondents shall notify him periodically thereafter in writing of further actions taken to comply with this Order.

IT IS FURTHER ORDERED that allegations contained in the First Amended Consolidated Complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

DATED: _____

AGRICULTURAL LABOR RELATIONS BOARD

By

_____

JOEL GOMBERG
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. to organize themselves;
2. to form, join, or help any union;
3. to bargain as a group and to choose anyone they want to speak for them;
4. to act together with other workers to try to get a contract or to help or protect each other; and
5. to decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT refuse to hire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer jobs, if they want them, to all the agricultural employees of Rancho Sespe who were on the payroll on January 15, 1979, and we will pay each of them any money they lost because we refused to hire them. If we do not have enough jobs available to hire everyone immediately, we will put your name on a list to be hired as soon as positions become available.

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL NOT take any steps to evict any former Rancho Sespe employees from their homes on the ranch without first

bargaining in good faith with the UFW in an effort to come to an agreement about the future of the housing.

DATED:

RIVCOM CORPORATION

By: _____
(Representative) (Title)

RIVERBEND FARMS, INC.

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

VENTURA COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA

Consolidated
No. MC 1913

RIVCOM INC., a California Corporation,
Plaintiff,

v.

CATARINO G. RANGEL, et al.,
Defendants.

FILED
VENTURA COUNTY MUNICIPAL COURT
APR 22 1980
JAMES G. FOX, CLERK
By C. Brandt, Dep. Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled consolidated action came on regularly for trial on October 22, 1979, before the Court sitting without a jury. Plaintiff Rivcom, Inc. appeared by The Law Firm of Thomas E. Campagne, A Professional Corporation, by Thomas E. Campagne, Esq. Defendants appeared by Cathy Christian, Esq. and Robert J. Miller, Esq. of Channel Counties Legal Services Association. The Court having heard the evidence and considered the stipulations and the pleadings of the parties herein, now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff Rivcom, Inc. is and at all times herein was, a corporation organized and existing under the laws of the State

of California, and doing business in the County of Ventura, State of California.

2. At all times herein, the defendants, and each of them, were residents of the County of Ventura, State of California, each residing at the address appearing opposite his name in Exhibit "A" attached hereto. The contents of Exhibit "A" are hereby incorporated by reference as though fully set forth herein.

3. The real property, possession of which is sought by the plaintiff in the above-entitled action, is referred to more particularly in paragraph 4 and is situated in an unincorporated area of the County of Ventura, in the above-named judicial district.

4. Prior to January 16, 1979, P.I.C. Realty Corporation, a Delaware Corporation, hereafter referred to as "PIC", was the owner of certain residential houses and apartments, referred to hereafter as ranch houses, located upon certain agricultural property located in the County of Ventura, more particularly known as Rancho Sespe. The ranch houses are in two groups known as Sespe Village and Oak Village, and each house is numbered according to a Rancho Sespe plan. The street addresses and the numbers of said ranch houses are set forth in Exhibit "A".

5. Prior to January 16, 1979 the above-described agricultural real property was managed by an independent contractor, National Property Management Systems, a California corporation, hereafter referred to as "NPMS", pursuant to a written contract executed between NPMS and PIC.

6. Prior to January 16, 1979, NPMS d/b/a Rancho Sespe, and each defendant (with the exception of Francisco Casas, originally sued as Francisco Cesar) entered into an oral agreement whereby NPMS employed the defendant as a farm laborer.

7. By the terms of a written license NPMS d/b/a Rancho Sespe, agreed to furnish to each defendant (with the exception of Francisco Casas) as partial compensation for his services as

a farm laborer, during the continuation of said employment, the use and occupancy of the ranch house described opposite his name in Exhibit "A".

8. Pursuant to said written license, each defendant (with the exception of Francisco Casas) prior to January 16, 1979 entered into occupancy of said ranch house and continues to occupy the same.

9. Defendant Francisco Casas was retired and was not employed by NMPS at the time of the transfer of ownership of the Ranch on January 16, 1979. Defendant Casas was in possession of the ranch house described opposite his name in Exhibit "A" by reason of an oral month-to-month tenancy with NPMS, rather than a written employment license. Defendant Casas continues to occupy said ranch house.

10. On January 16, 1979, PIC conveyed for valuable consideration all its right, title and interest in the above-described real property and the residential houses and apartments located thereon to Paraships Builders, Inc., a California corporation, hereafter referred to as "Paraships".

11. On January 16, 1979, Paraships conveyed for a valuable consideration all its right, title and interest in the above-described real property and the residential houses and apartments located thereon to Newport Beach Development Co., Inc., a California corporation, hereafter referred to as "Newport".

12. On January 16, 1979, Newport executed a written lease for a term of 15 years, of the above-described agricultural real property known as Rancho Sespe and the ranch houses located thereon to plaintiff Rivcom.

13. On January 25, 1979, plaintiff Rivcom caused to be served and did validly serve upon each defendant (with the exception of defendant Francisco Casas) a written notice declaring the license of each said defendant to occupy his ranch house terminated at the expiration of thirty (30) days following the service of the notice on each defendant and requiring each defendant to deliver up possession of the said premises to the

authorized agent of plaintiff Rivcom on or before expiration of the said 30-day period.

14. On March 12, 1979, plaintiff Rivom caused to be served and did validly serve upon defendant Francisco Casas a written notice declaring the oral month-to-month tenancy by which defendant Casas occupied his ranch house terminated at the expiration of 30 days following the service of the notice on defendant Casas and requiring defendant Casas to deliver up possession of the said premises to the authorized agent of plaintiff Rivcom on or before the expiration of the said 30-day period.

15. Each and every defendant in this consolidated action, including defendant Casas, has been validly served with a proper 30-day Notice to Quit.

16. In each instance more than 35 days lapsed from the date of service of the aforementioned Notice To Quit upon a defendant and the time the appropriate Complaint in this consolidated action was filed and served upon the same defendant. The date of service of summons and complaint on each defendant is set out on Exhibit "A" in the column labeled "Date Damages Began to Accrue."

17. The defendants, and each of them, have failed and refused to deliver possession of any of said ranch houses to plaintiff.

18. Defendants, and each of them, continue in possession of said ranch houses without plaintiff's permission or consent, contrary to the terms of the above-described Notices to Quit, and contrary to the terms of defendant Casas' oral month-to-month agreement and each other defendant's written license agreement.

19. No defendant continued in possession with the intent to vex, annnoy or injure plaintiff and such continuance in possession was not willful, deliberate or malicious.

20. The written license agreement required each defendant except Casas to pay to NPMS the sum of $10 per month.

Such sum was a token payment only and does not measure the reasonable rental value of the ranch house occupied by any defendant.

21. The oral agreement required defendant Casas to pay to NPMS $75 per month. Such sum was a token payment only and does not measure the reasonable rental value of the ranch house occupied by him.

22. The ranch houses are old, dilapidated and rundown. As to some houses the gas service or electric service or water service is defective. None of the houses meets modern day standards or construction and safety.

23. Plaintiff is required by court order in Ventura County Superior Court case No. 67653 to maintain the ranch houses and continue utility services to them. Such order was obtained by the ALRB and indirectly benefits defendants and each of them.

24. The occupancy of each ranch house has a measurable worth. The facts set out in findings Nos. 22 and 23 as well as rental paid for comparable dwellings in the same area are factors which were taken into account in determining the value of such occupancy.

25. The minimum reasonable rental value of each ranch house in Sespe Village was and is $100.00 per month without utilities and $125.00 per month with utilities. The minimum reasonable rental value of each ranch house in Oak Village was and is $115.00 per month without utilities and $140.00 per month with utilities.

26. Since January 16, 1979 plaintiff has continually provided each ranch house occupied by a defendant with water, sewage and garbage disposal, and utilities. Each defendant pays for his electricity.

27. The United Farm Workers of America, AFL-CIO (hereafter UFW) was certified by the Agricultural Labor Relations Board (hereafter ALRB) as the collective bargaining

representative of the NPMS employees at Rancho Sespe on May 17, 1978. Defendants constituted some but not all of said employees.

28. The UFW and NPMS had participated in negotiations but had not yet reached a collective bargaining agreement of January 16, 1979.

29. On January 16, 1979 NPMS informed all of its employees, including defendants, that their employment was terminated. The parties stipulated that said termination of employment was lawful.

30. On or about January 16, 1979 Larry Harris, president of plaintiff Rivcom, knew of the UFW certification of NPMS employees at Rancho Sespe. He also believed that if Rivcom continued operating the ranch in the same manner as NPMS and if Rivcom hired a majority of its employees from among the old NPMS workers, then Rivcom would be obligated to bargain with UFW concerning terms and conditions of employment. Harris gave consideration to these matters as a part of his overall review of the problems Rivcom faced in taking over the Ranch.

31. Plaintiff did not consider any of the defendants for employment.

32. Plaintiff did not offer any defendant employment.

33. No individual defendant applied to plaintiff for employment, either orally or in writing.

34. No defendant made an unconditional application to plaintiff for employment.

35. A UFW representative made three demands to plaintiff that it employ defendants. On January 18, 1979 UFW negotiator Emilio Huerta orally requested plaintiff to hire the former employees of NPMS, including defendants. The UFW also sent to plaintiff two written requests for employment of said employees, including defendants. One was a mailgram dated January 8, 1979 and the other was a letter dated February 1, 1979.

36. Each of the three demands for employment made by UFW to plaintiff contained one or more of the following conditions: (1) reinstate all NPMS employees to their former positions; (2) reinstate all NPMS employees with their former seniority; (3) immediately commence bargaining with the UFW for a collective bargaining agreement; and (4) withdraw all eviction notices served on defendants.

37. None of the three demands for employment made by the UFW was an unconditional application for employment on behalf of any defendant.

38. On January 30, 1979 a large number of persons appeared at the plaintiff's office on Ranch Sespe bearing banners with slogans. Many persons in the group were identified as former employees. Defendant Jaime Zepeda acted as spokesman. No other defendant was identified as being present. Zepeda said they were there to get their jobs back. About a dozen persons in the group said they wanted their jobs back "all or none". The statements of Zepeda and the others present were a demand to plaintiff that it hire all of the former employees of NPMS or none of them.

39. The statements made by defendant Zepeda and other members of the group on January 30, 1979 did not constitute an application by any individual defendant to plaintiff for employment.

40. The statements made by defendant Zepeda and other members of the group did not constitute an unconditional application for employment to plaintiff Rivcom by any defendant.

41. Plaintiff did not inform any defendant that he should make an individual unconditional application for employment. Plaintiff did not furnish any defendant with a job application form. Plaintiff did not inform any defendant of any custom or practice he should follow in order to obtain employment with plaintiff.

42. Defendants have not established by a preponderance of the evidence that plaintiff's "dominant purpose" for the evictions was anti-union bias.

43. Defendants have not established by a preponderance of the evidence that but for their union membership and activities plaintiff would have hired them, or any of them.

44. Defendants have not established by a preponderance of the evidence that but for their union membership and activities plaintiff would have permitted them, or any of them, to remain in their ranch houses.

45. Upon taking possession of Rancho Sespe plaintiff decided to change the methods of operating the ranch from the methods used by NPMS. The changes included reductions in the sizes of the work crews, changes in hiring practices, changes in culturing operations changes in marketing operations, elimination of the practice of housing employees on the premises, and destruction or removal of the ranch houses in order to use the land for other purposes.

46. Valid economic and business reasons existed for plaintiff to change the methods of operation. Some of the changes were relatively minor. The sum total of all the intended changes was a substantial change in the overall methods of operating the ranch from the methods of NPMS. It was not the dominant purpose of plaintiff in making the changes, or any of them, to avoid union bargaining or to evict defendants, or any of them, because of their union membership or activities.

47. Plaintiff was generally aware of the dilapidated condition of the ranch houses at the time the decision to evict defendants was made. The estimated cost of renovation and repair of the ranch houses was in the magnitude of $20,000 per ranch house. The decision to raze the ranch houses and to devote the land to other productive purposes was based upon economic and financial considerations and was not unreasonable. In reaching the decision it was not plainiff's dominant purpose to avoid union bargaining or to evict defendants, or any of them, because of their union membership or activities.

48. Upon taking over the ranch, plaintiff concluded that the NPMS method of operation was labor intensive and decided to hire a labor contractor or custom harvestor to perform

certain culturing and harvesting activities, rather than hire its own employees to perform these tasks. This was a change from the former method of operation. Plaintiff's president had utilized such labor contractors and harvestors in previous ranching operations supervised by him, and the custom is common in the citrus industry. The conclusion of plaintiff's president that the former method of operation was labor intensive and plaintiff's decision to hire a labor contractor or custom harvestor were not unreasonable. In making such a decision it was not plaintiff's dominant purpose to avoid union bargaining or to evict defendants, or any of them because of their union membership or activities.

49. Plaintiff concluded it was more expensive to employ persons and provide them with housing and maintain housing on the ranch than to employ persons who reside off the premises. Such a conclusion was not unreasonable. In arriving at such conclusion it was not plaintiff's dominant purpose to avoid union bargaining or to evict defendants, or any of them, because of their union membership or activities.

50. Larry Harris did not tell Allen Lombard that he wanted to get rid of the union.

51. Larry Harris said to Allen Lombard that it was necessary to show the differences in operation under the old management and the new management so that Rivcom would not have to recognize and bargain with the union. In context this statement was an explanation to Lombard of the effect of a substantial change in operation. The import of the statement is that where a substantial change in the operation of the ranch was made, the new management was not required to hire the former workers or bargain with the union. Harris was stating his understanding of the applicable law, and was not displaying anti-union bias or an intent to evict defendants or any of them, because of their union membership or activities.

52. In failing to consider defendants for employment plaintiff did not discriminate against defendants, or any of them, because of their union membership or activities.

53. In failing to hire defendants plaintiff did not discriminate against defendants, or any of them, by reason of their union membership or activities.

54. There is no evidence that any defendant would have been permitted to occupy a ranch house if he had been employed by plaintiff. There is no evidence that plaintiff ever did or would furnish housing as partial compensation for employment of any defendant or any other person.

55. There is no evidence from which it may be determined how many former NPMS employees plaintiff would have hired if it had decided to hire former employees.

56. There is no evidence from which it may be determined that any defendant would have been employed by plaintiff if plaintiff had decided to hire any former NPMS employees.

57. Even if plaintiff had decided to employ all or any of defendants there is no evidence from which it may be determined that plaintiff would have offered any defendant a ranch house in partial compensation for such employment.

58. Defendant Francisco Casas was retired and was not employed by NPMS at the time of the transfer of the ownership of the agricultural real property.

59. Casas did not apply to plaintiff for employment.

60. Casas did not intend to apply to plaintiff for employment and no application was made on his behalf.

61. There was no evidence that defendant Casas ever engaged in union activities or was a member of UFW.

62. Plaintiff did not seek to evict defendant Casas because of an anti-union bias, or in retaliation for union membership or activities.

63. Plaintiff's dominant purpose for evicting defendants, and each of them, is not retaliation against defendants for their exercise of any statutorily protected right, nor discrimination against any defendant because of union membership or activity.

64. Plaintiff would not have hired any defendant regardless of whether he was a member of UFW or engaged in union activities.

65. Plaintiff would have evicted each defendant even if he had not been a member of UFW or engaged in union activities.

66. No defendant has paid to plaintiff any sum of money whatsoever, for occupancy of any ranch house or for water or utilities or garbage service or for any other reason or purpose.

CONCLUSIONS OF LAW

1. Plaintiff validly served each of the defendants with a proper 30-Day Notice to Quit.

2. A prima facie case in unlawful detainer has been made out against each defendant.

3. Plaintiff is not entitled to treble or punitive damages.

4. The California legislature by enacting Civil Code Section 1942.5 did not pre-empt the field of retaliatory eviction and therefore did not limit that defense to uninhabitability. Defendants are not precluded from raising the affirmative defense of retaliatory eviction arising out of an exercise of rights protected by the Labor Code.

5. Defendants are not precluded from raising the affirmative defense of retaliatory eviction even though they have not paid to plaintiffs the sums of money which they would have paid to NFMS under the license agreements had they continued to be employed.

6. Each defendant has the burden of proving his affirmative defense of retaliatory eviction by a preponderance of the evidence.

7. The municipal court in an unlawful detainer proceeding must hear evidence of an affirmative defense of retaliatory eviction involving labor activity.

8. The ALRB does not have the authority or power to resolve unlawful detainer cases.

9. This municipal court is not bound by the Decision and Order of the ALRB in the cases brought against Rivcom, Nos. 79-CE-1-OX and 79-CE-4-OX *(Rivcom Corporation and Riverbend Farms, Inc.* [1979] 5 ALRB No. 55.). Said Decision and Order is not yet final. It is not res judicata or grounds for estopping or staying indefinitely the instant unlawful detainer action.

10. This municipal court took cognizance of the above ALRB proceedings and allowed ample time for the ALRB to attempt to resolve the portion of the labor dispute that related to housing. Considering the number of defendants and compelexity of the issues, a delay of seven or eight months was a reasonable time to permit the ALRB to resolve the issues. Further delay of the trial was not merited.

11. An unlawful detainer is a summary proceeding. To stay or delay an unlawful detainer case pending the final outcome of an ALRB proceeding would defeat the basic purpose of an unlawful detainer proceeding.

12. The employment of all defendants was lawfully terminated.

13. There was no employer-employee relationship between plaintiff and any defendant.

14. Plaintiff was not obligated to hire all the defendants, or any of them.

15. Plaintiff was not obligated to consider any defendant for employment unless he made an unconditional application to plaintiff for employment.

16. Plaintiff had no obligation or duty to notify any defendant of the requirement that he make an unconditional application for employment.

17. Each defendant had the obligation of tendering to plaintiff an unconditional application for employment.

18. Every application for employment tendered to plaintiff on behalf of a defendant contained one or more conditions. None was an unconditional application for employment.

19. Plaintiff had no duty or obligation to consider any defendant for employment.

20. Plaintiff did not discriminatorily refuse to hire any defendant.

21. Each defendant occupied the ranch house described opposite his name in Exhibit "A" as a condition of his employment with NPMS. When a defendant's employment was lawfully terminated, his right to occupy the ranch house was lawfully terminated.

22. Defendants had the burdern of showing that plaintiff's dominant purpose for the evictions was to retaliate against them for their union membership or activity. Each defendant had the burden of establishing that he would not have been evicted but for this retaliatory motive.

23. It was not unlawful for plaintiff to avoid union bargaining so long as this was not the dominant purpose for refusing to consider defendants for employment or the dominant purpose for evicting them.

24. Plaintiff was not required or obligated to continue to operate the agricultural real property in the same manner as the previous owner.

25. Plaintiff has no obligation or duty to provide any of its employees with housing as a condition of employment.

26. Plaintiff was not obligated to bargain with the UFW over the terms and conditions of employment or housing of any defendant or any other person.

27. Proof that plaintiff committed an act constituting an unfair labor practice as defined in the Labor Code does no automatically establish retaliation or discrimination as plaintiff's motive for evicting any defendant.

28. Plaintiff had no obligation or duty to consider defendant Casas for employment.

29. Plaintiff's motive and dominant purpose for evicting defendants, and each of them, were not unlawful or improper.

30. There was no lawful reason why this municipal court should not have commenced this unlawful detainer proceeding on the date set for trial.

31. Each defendant's asserted defense or retaliatory evictor is without merit.

32. Plaintiff is entitled to evict each defendant.

33. Plaintiff is entitled to an order for possession against each defendant herein for the ranch house described opposite said defendant's name on Exhibit "A".

34. The fact that any ranch house is in dilapidated condition or that plaintiff has expressed an opinion that it is uninhabitable, does not mean that the ranch house has no reasonable rental value. It has a worth which may be measured by the same standards used to measure the market value of property generally.

35. The fair market rental value for each ranch house in Sespe Village is $125 per month, and the fair market rental value for each ranch house in Oak Village is $140 per month.

36. Plaintiff has been damaged by the continued occupancy of the ranch houses by defendants.

37. Plaintiff is entitled to an order for damages against each defendant measured by the fair market rental value of the ranch house occupied by said defendant and described opposite his name in Exhibit "A", together with interest thereon as provided by law, plus costs and necessary disbursements.

38. Said order shall provide that damages accrue monthly as to each defendant in the sum set out opposite said defendant's name in the column headed "Damages Per Month" in Exhibit "A".

39. Said order for damages shall provide that damages accrue as to each defendant from and after the date set forth in Exhibit "A" opposite the defendant's name in the column headed "Date Damages Began To Accrue", to and including the date of entry of judgment.

Dated: April 22, 1980.

/s/ BRUCE A. THOMPSON
Bruce A. Thompson
Judge of the Municipal Court, Assignee

nch use .	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue
&	Sespe	Antonio E. Holasco	MC-1858	21 North Main St. 9 North Main St.	$250.00	Feb. 25, 1979
	Sespe	Ernesto Quijade	MC-1858	2580 Wilson Ave.	$125.00	Feb. 25, 1979
	Sespe	Cirilo E. Nolasco	MC-1858	2559 Wilson Ave.	$125.00	Feb. 25, 1979
	Sespe	Pablo M. Martinez	MC-1858	35 South Main St.	$125.00	Feb. 25, 1979
	Sespe	M. R. Arana	MC-1858	65 South Main St.	$125.00	Feb. 25, 1979
	Sespe	Juan M. Rodriguez	MC-1858	58 South Main St.	$125.00	Feb. 25, 1979
	Sespe	Ramiro G. Munoz	MC-1858	122 South Main St.	$125.00	Feb. 25, 1979
	Sespe	Andres G. D.Leon	MC-1858	127 South Main St.	$125.00	Feb. 25, 1979
	Sespe	Victor M. Torres	MC-1858	2591 Oak Street	$125.00	Feb. 25, 1979
	Sespe	Victor O. Dominguez	MC-1858	2520 Oak Street	$125.00	Feb. 25, 1979
	Sespe	Jose A. Ordax	MC-1858	2520 Oak Street	$125.00	Feb. 25, 1979
	Sespe	Pedro M. Gaitan	MC-1858	202 Orange Street	$125.00	Feb. 25, 1979
	Sespe	Jesus A. Murillo	MC-1858	202 Orange Street	$125.00	Feb. 25, 1979
0	Sespe	Abel A. Sevilla	MC-1858	9 Eucalyptus Dr.	$125.00	Feb. 25, 1979
1	Sespe	Bulmaro L. Medina	MC-1858	13 Eucalyptus Dr.	$125.00	Feb. 25, 1979
2	Sespe	Luz J. Solorzano	MC-1858	17 Eucalyptus Dr.	$125.00	Feb. 25, 1979
7	Sespe	Jose Martinez	MC-1858	29 Eucalyptus Dr.	$125.00	Feb. 25, 1979
2	Sespe	Pedro A. Ortiz	MC-1858	45 Eucalyptus Dr.	$125.00	Feb. 25, 1979
4	Sespe	Luis S. Martinez	MC-1858	49 Eucalyptus Dr.	$125.00	Feb. 25, 1979
8	Sespe	Genaro A. Arroyo	MC-1858	59 Eucalyptus Dr.	$125.00	Feb. 25, 1979
9	Sespe	Javier G. Velasco	MC-1858	63 Eucalyptus Dr.	$125.00	Feb. 25, 1979

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue
123	Sespe	Isabel P. Chavez	MC-1858	69 Eucalyptus Dr.	$125.00	Feb. 25, 1979
126	Sespe	Carmelo Tepezano	MC-1858	79 Eucalyptus Dr.	$125.00	Feb. 25, 1979
130	Sespe	Miguel Lopez	MC-1858	85 Eucalyptus Dr.	$125.00	Feb. 25, 1979
131	Sespe	Mario Adame	MC-1858	87 Eucalyptus Dr.	$125.00	Feb. 25, 1979
141	Sespe	Jose Salazar	MC-1858	121 Eucalyptus Dr.	$125.00	Feb. 25, 1979
904	Oak	Sotero B. Manzano	MC-1858	264A Oak Village Rd. 264B Oak Village Rd.	$280.00	Feb. 25, 1979
921	Oak	Ramon T. Becerra	MC-1858	242B Oak Village Rd.	$140.00	Feb. 25, 1979
930	Oak	Relipe A. Becerra	MC-1858	244A Oak Village Rd.	$140.00	Feb. 25, 1979
946 & 947	Oak	Hector M. Alvarez	MC-1858	292A Oak Village Rd. 292B Oak Village Rd.	$280.00	Feb. 25, 1979
2	Sespe	Carlos M. Chavez	MC-1913	85 North Main Street	$125.00	March 2, 1979
71	Sespe	Jose V. Mariscal	MC-1913	2517 Oak Street	$125.00	March 2, 1979
43	Sespe	Angel P. Vallin	MC-1913	105 South Main St.	$125.00	March 2, 1979
24	Sespe	Magdaleno Martinez	MC-1913	2561 Wilson St.	$125.00	March 2, 1979
22	Sespe	Isidro P. Arroyos	MC-1913	2572 Wilson St.	$125.00	March 2, 1979
17	Sespe	Miguel L. Lopez	MC-1913	24 North Main St.	$125.00	March 2, 1979
32	Sespe	Daniel C. Tapia	MC-1913	55 North Main St.	$125.00	March 2, 1979
27	Sespe	Alfonso Gonzalez	MC-1913	2554 Wilson St.	$125.00	March 2, 1979
26	Sespe	Tiburcio Juarez	MC-1913	2559 Wilson St.	$125.00	March 2, 1979
38	Sespe	Javier Tapia	MC-1913	83 South Main St.	$125.00	March 2, 1979
4	Sespe	Nazario A. Lopez	MC-1913	65 North Main St.	$125.00	March 2, 1979

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue
5	Sespe	Alfonso M. Corona	MC-1913	51 North Main St.	$125.00	March 2, 1979
38	Sespe	Juan M. Lepe	MC-1913	264 Orange St.	$125.00	March 2, 1979
37	Sespe	Jose M. Martinez	MC-1913	260 Orange St.	$125.00	March 2, 1979
33	Sespe	Francisco Valdovinos	MC-1913	208 Orange St.	$125.00	March 2, 1979
38	Sespe	Salvador R. Ramirez	MC-1913	264 Orange St.	$125.00	March 2, 1979
38	Sespe	Enrique M. Lepe	MC-1913	264 Orange St.	$125.00	March 2, 1979
39	Sespe	Fernando Martinez	MC-1913	118 South Main St.	$125.00	March 2, 1979
50	Sespe	Alfredo M. Martinez	MC-1913	121 South Main St.	$125.00	March 2, 1979
48	Sespe	Alejandro G. Gonzalez	MC-1913	117 South Main St.	$125.00	March 2, 1979
46	Sespe	Librado Estrella	MC-1913	111 South Main St.	$125.00	March 2, 1979
109	Sespe	Raul Z. Loza	MC-1913	35 Eucalyptus Dr.	$125.00	March 2, 1979
108	Sespe	Justo G. Loza	MC-1913	31 Eucalyptus Dr.	$125.00	March 2, 1979
111	Sespe	Clemente G. Baro	MC-1913	41 Eucalyptus Dr.	$125.00	March 2, 1979
110	Sespe	Jose M. Diaz	MC-1913	39 Eucalyptus Dr.	$125.00	March 2, 1979
140	Sespe	Miguel Torres	MC-1913	117 Eucalyptus Dr.	$125.00	March 2, 1979
139	Sespe	Jose M. Contreras	MC-1913	111 Eucalyptus Dr.	$125.00	March 2, 1979
55	Sespe	Jesus C. Murillo	MC-1913	2540 Oak Street	$125.00	March 2, 1979
60	Sespe	Ysabel Gonzalez	MC-1913	2560 Oak Street	$125.00	March 2, 1979
55	Sespe	Gaspar Martinez	MC-1913	2583 Oak Street	$125.00	March 2, 1979
56	Sespe	Felix P. Arrellano	MC-1913	2580 Oak Street	$125.00	March 2, 1979
12	Sespe	Daniel R. Tapia	MC-1913	39 North Main St.	$125.00	March 2, 1979
14	Sespe	Salomon T. Chavez	MC-1913	33 North Main St.	$125.00	March 2, 1979

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue
16	Sespe	Francisco Murillo	MC-1913	29 North Main St.	$125.00	March 2, 1979
104	Sespe	Francisco M. Ibarra	MC-1913	21 Eucalyptus Dr.	$125.00	March 2, 1979
113	Sespe	Frank Rodriguez	MC-1913	47 Eucalyptus Dr.	$125.00	March 2, 1979
122	Sespe	Agustin Alamillo	MC-1913	67 Eucalyptus Dr.	$125.00	March 2, 1979
117	Sespe	Marcos R. Ochoa	MC-1913	55 Eucalyptus Dr.	$125.00	March 2, 1979
134	Sespe	Julian Garcia	MC-1913	93 Eucalyptus Dr.	$125.00	March 2, 1979
136	Sespe	Jose Estrella	MC-1913	97 Eucalyptus Dr.	$125.00	March 2, 1979
138	Sespe	Antonio Becerra	MC-1913	107 Eucalyptus Dr.	$125.00	March 2, 1979
125	Sespe	Ramiro S. Perez	MC-1913	77 Eucalyptus Dr.	$125.00	March 2, 1979
129	Sespe	Juan DeLaRosa	MC-1913	58 Eucalyptus Dr.	$125.00	March 2, 1979
900	Oak	Catarino G. Rangel	MC-1913	284B Oak Village Rd. 284A Oak Village Rd.	$280.00	March 2, 1979
908	Oak	Francisco J. Perez	MC-1913	240A Oak Village Rd. 240B Oak Village Rd.	280.00	March 2, 1979
902	Oak	Francisco M. Ruiz	MC-1913	274A Oak Village Rd.	$140.00	March 2, 1979
907	Oak	Alfonso M. Ambrocio	MC-1913	252B Oak Village Rd.	$140.00	March 2, 1979
916	Oak	Antonio Ruiz	MC-1913	266A Oak Village Rd.	$140.00	March 2, 1979
920	Oak	Cosme B. Alba	MC-1913	242A Oak Village Rd.	$140.00	March 2, 1979
918	Oak	Jesus C. Toledo	MC-1913	254A Oak Village Rd.	$140.00	March 2, 1979
922	Oak	Paulino G. Herta	MC-1913	232A Oak Village Rd.	$140.00	March 2, 1979
928	Oak	Refugio M. Toledo	MC-1913	256A Oak Village Rd.	$140.00	March 2, 1979
924	Oak	Julio M. Trujillo	MC-1913	288A Oak Village Rd. 288B Oak Village Rd.	$280.00	March 2, 1979

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue
927	Oak	Aurelio P. Chavez	MC-1913	278B Oak Village Rd.	$140.00	March 2, 1979
950	Oak	Paulin Magana	MC-1913	272A Oak Village Rd.	$140.00	March 2, 1979
934 & 935	Oak	Alfredo Mejia	MC-1913	290 Oak Village Rd. 290B Oak Village Rd.	$280.00	March 2, 1979
937	Oak	Jesus G. Reyes	MC-1913	280B Oak Village Rd.	$140.00	March 2, 1979
938 & 939	Oak	Rogelio Rodriguez	MC-1913	270A Oak Village Rd. 270B Oak Village Rd.	$280.00	March 2, 1979
945	Oak	Jubenal Valdovinos	MC-1913	236B Oak Village Rd.	$140.00	March 2, 1979
	Sespe	Jaime O. Zepeda	MC-2551	2537 Wilson Avenue	$125.00	April 2, 1979
	Sespe	Francisco Cesar	MC-2680	91 Eucalyptus Dr.	$125.00	April 12, 1979
	Sespe	David Morales	MC-2690	102 South Main St.	$125.00	April 12, 1979
	Sespe	Ventura Elizando	MC-2691	3011 E. Telegraph Rd.	$125.00	April 12, 1979
	Oak	Jose L. Ortiz	MC-2687	266B Oak Village Rd.	$140.00	April 12, 1979
	Oak	Alfonso Velasco	MC-2686	234A Oak Village Rd.	$140.00	April 12, 1979
	Oak	Jose de Jesus Velasco	MC-3885	234B Oak Village Rd.	$140.00	May 14, 1979

VENTURA COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA

Consolidated
No. MC 1913

RIVCOM INC., a California Corporation,
Plaintiff,

v.

CATARINO G. RANGEL, et al.,
Defendants.

FILED
VENTURA COUNTY
MUNICIPAL COURT
APR 25 1980
JAMES G. FOX, CLERK
CYNTHEA BRANDT DEP. CLERK

JUDGMENT

In accordance with the "Statement Of Intended Decision" of this Court filed in this consolidated action on January 24, 1980, disposing of all issues presented in this case; and in accordance with the foregoing "Findings Of Fact And Conclusions Of Law," it is hereby ORDERED, ADJUDGED, and DECREED:

1. That the Plaintiff shall have and is hereby granted an Order Of Possession against each and every Defendant in this consolidated action.

2. That the Plaintiff shall have and is hereby granted an Order For Damages against each and every Defendant in this consolidated action in that amount which is set forth opposite

each Defendant's name as listed in Exhibit "A" (attached hereto and incorporated herein by reference) in the column designated "Order For Damages", together with interest thereon as provided by law, plus each Defendant's pro rata share of the Plaintiff's costs and necessary disbursements.

DATED this 25th day of April, 1980.

/s/ BRUCE A. THOMPSON
Bruce A. Thompson
Judge of the Municipal Court, Assignee

Judgment Entered Apr 25 1980
JMT Book III
PAGE 1590
Ventura County Municipal Court

NOV 19 1983

ORDER DUE
November 16, 1983

ORDER DENYING REHEARING

S.F. No. 24520

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

RIVCOM CORPORATION ET AL.

v.

AGRICULTURAL LABOR RELATIONS BOARD, Respondent;
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Real Party in Interest

BIRD, C.J., DID NOT PARTICIPATE.

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petitions

for rehearing DENIED.

Richardson, J., is of the opinion the petition should be granted.

SUPREME COURT
FILED
NOV 16 1983
LAURENCE P. GILL, Clerk
Deputy

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 24520

RIVCOM CORPORATION *et. al.*,
Petitioners,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent;
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Real Party in Interest.

Appeal ALRB No. 5 ALRB 55

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court*

Let a decree issue enforcing the order of the Board in accordance with the views expressed in this opinion.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 17th day of October, 1983.*

WITNESS *my hand and the seal of the Court, this 17th day of November, 1983.*

LAURENCE P. GILL
Clerk

Agricultural Labor Relations Act, California Labor Code (excerpts) (West 1975 & Supp. 1983)

§ 1140.4. Definitions

As used in this part:

(a) The term "agriculture" includes farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12 of the United States Code), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

(b) The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

Further, nothing in this part shall apply, or be construed to apply, to any employee who performs work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work (as these terms have been construed under Section 8(e) of the Labor Management Relations Act, 29 USC Section 158(e)) or logging or timber-clearing operations in initial preparation of land for farming, or who does land leveling or only land surveying for any of the above.

As used in this subdivision, "land leveling" shall include only major land moving operations changing the contour of the land, but shall not include annual or seasonal tillage or preparation of land for cultivation.

(c) The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricul-

tural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

(d) The term "person" shall mean one or more individuals, corporations, partnerships, associations, legal representatives, trustees in bankruptcy, receivers, or any other legal entity, employer, or labor organization having an interest in the outcome of a proceeding under this part.

(e) The term "representatives" includes any individual or labor organization.

(f) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

(g) The term "unfair labor practice" means any unfair labor practice specified in Chapter 4 (commencing with Section 1153) of this part.

(h) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(i) The term "board" means Agricultural Labor Relations Board.

(j) The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the re-

sponsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 1148. Applicability of precedents of federal act

The board shall follow applicable precedents of the National Labor Relations Act, as amended.

§ 1153. Employer; unfair labor practices

It shall be an unfair labor practice for an agricultural employer to do any of the following:

(a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152.

(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. However, subject to such rules and regulations as may be made and published by the board pursuant to Section 1144, an agricultural employer shall not be prohibited from permitting agricultural employees to confer with him during working hours without loss of time or pay.

(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein on or after the fifth day following the beginning of such employment, or the effective date of such agreement whichever is later, if such labor organization is the representative of the agricultural employees as provided in Section 1156 in the appropriate collective-bargaining unit covered by such agreement. No employee who has been required to pay dues to a labor organization by virtue of his employment as an agricultural worker during any calendar month, shall be required to

pay dues to another labor organization by virtue of similar employment during such month. For purposes of this chapter, membership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership.

(d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part.

(e) To refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part.

(f) To recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part.

§ 1156. Exclusive representatives; grievances

Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. Any individual agricultural employee or a group of agricultural employees shall have the right at any time to present grievances to their agricultural employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect, if the bargaining representative has been given opportunity to be present at such adjustment.

§ 1160.2. Complaint; contents; amendment; answer; limitations

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agency or agencies, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing, or the board in its discretion, at any time prior to the issuance of an order based thereon. The person so complained against shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the board, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code. All proceedings shall be appropriately reported.

§ 1160.3. Reduction of testimony to writing; order; contents; dismissal; modification of finding or order

The testimony taken by such member, agent, or agency, or the board in such hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its

findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon the preponderance of the testimony taken, the board shall be of the opinion that the person named in the complaint has not engaged in or is not engaging in any unfair labor practice, the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the board, or before an administrative law officer thereof, such member, or such administrative law officer, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and, if no exceptions are filed within 20 days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

§ 1160.8. Petition to modify or set aside board order; jurisdiction; procedure

Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

END OF DOCKET

EXHIBIT "A" TO JUDGMENT IN CONSOLIDATED CASE NO. MC 1913

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue	Order for Damages
18 & 19	Sespe	Antonio E. Holasco	MC-1858	21 North Main St. 9 North Main St.	$250.00	Feb. 25, 1979	$3,485.28
21	Sespe	Ernesto Quijade	MC-1858	2580 Wilson Ave.	$125.00	Feb. 25, 1979	$1,742.64
25	Sespe	Cirilo E. Nolasco	MC-1858	2559 Wilson Ave.	$125.00	Feb. 25, 1979	$1,742.64
29	Sespe	Pablo M. Martinez	MC-1858	35 South Main St.	$125.00	Feb. 25, 1979	$1,742.64
35	Sespe	M. R. Arana	MC-1858	65 South Main St.	$125.00	Feb. 25, 1979	$1,742.64
36	Sespe	Juan M. Rodriguez	MC-1858	58 South Main St.	$125.00	Feb. 25, 1979	$1,742.64
51	Sespe	Ramiro G. Munoz	MC-1858	122 South Main St.	$125.00	Feb. 25, 1979	$1,742.64
52	Sespe	Andres C. DeLeon	MC-1858	127 South Main St.	$125.00	Feb. 25, 1979	$1,742.64
53	Sespe	Victor M. Torres	MC-1858	2591 Oak Street	$125.00	Feb. 25, 1979	$1,742.64
69	Sespe	Victor O. Dominguez	MC-1858	2520 Oak Street	$125.00	Feb. 25, 1979	$1,742.64
69	Sespe	Jose A. Ordax	MC-1858	2520 Oak Street	$125.00	Feb. 25, 1979	$1,742.64
81	Sespe	Pedro M. Gaitan	MC-1858	202 Orange Street	$125.00	Feb. 25, 1979	$1,742.64
81	Sespe	Jesus A. Murillo	MC-1858	202 Orange Street	$125.00	Feb. 25, 1979	$1,742.64
100	Sespe	Abel A. Sevilla	MC-1858	9 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
101	Sespe	Bulmaro L. Medina	MC-1858	13 Cucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
102	Sespe	Luz J. Solorzano	MC-1858	17 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
107	Sespe	Jose Martinez	MC-1858	29 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
112	Sespe	Pedro A. Ortiz	MC-1858	45 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue	Order for Damages
114	Sespe	Luis S. Martinez	MC-1858	49 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
118	Sespe	Genaro A. Arroyo	MC-1858	59 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
119	Sespe	Javier G. Velasco	MC-1858	63 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
123	Sespe	Isabel P. Chavez	MC-1858	69 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
126	Sespe	Carmelo Tepezano	MC-1858	79 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
130	Sespe	Miguel Lopez	MC-1858	85 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
131	Sespe	Mario Adame	MC-1858	87 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
141	Sespe	Jose Salazar	MC-1858	121 Eucalyptus Dr.	$125.00	Feb. 25, 1979	$1,742.64
904	Oak	Sotero B. Manzano	MC-1858	264A Oak Village Rd. 264B Oak Village Rd.	$280.00	Feb. 25, 1979	$3,905.04
921	Oak	Ramon T. Becerra	MC-1858	242B Oak Village Rd.	$140.00	Feb. 25, 1979	$1,950.40
930	Oak	Relipe A. Becerra	MC-1858	244A Oak Village Rd.	$140.00	Feb. 25, 1979	$1,950.40
946 & 947	Oak	Hector M. Alvarez	MC-1858	292A Oak Village Rd. 292B Oak Village Rd.	$280.00	Feb. 25, 1979	$3,905.04
2	Sespe	Carlos M. Chavez	MC-1913	85 North Main Street	$125.00	March 2, 1979	$1,721.94
71	Sespe	Jose V. Mariscal	MC-1913	2517 Oak Street	$125.00	March 2, 1979	$1,721.94
43	Sespe	Angel P. Vallin	MC-1913	105 South Main St.	$125.00	March 2, 1979	$1,721.94
24	Sespe	Magdaleno Martinez	MC-1913	2561 Wilson St.	$125.00	March 2, 1979	$1,721.94
22	Sespe	Isidro P. Arroyos	MC-1913	2572 Wilson St.	$125.00	March 2, 1979	$1,721.94
17	Sespe	Miguel L. Lopez	MC-1913	24 North Main St.	$125.00	March 2, 1979	$1,721.94
32	Sespe	Daniel C. Tapia	MC-1913	55 North Main St.	$125.00	March 2, 1979	$1,721.94

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue	Order for Damages
27	Sespe	Alfonso Gonzalez	MC-1913	2554 Wilson St.	$125.00	March 2, 1979	$1,721.94
26	Sespe	Tiburcio Juarez	MC-1913	2559 Wilson St.	$125.00	March 2, 1979	$1,721.94
38	Sespe	Javier Tapia	MC-1913	83 South Main St.	$125.00	March 2, 1979	$1,721.94
4	Sespe	Nazario A. Lopez	MC-1913	65 North Main St.	$125.00	March 2, 1979	$1,721.94
6	Sespe	Alfonso M. Corona	MC-1913	51 North Main St.	$125.00	March 2, 1979	$1,721.94
88	Sespe	Juan M. Lepe	MC-1913	264 Orange St.	$125.00	March 2, 1979	$1,721.94
87	Sespe	Jose M. Martinez	MC-1913	260 Orange St.	$125.00	March 2, 1979	$1,721.94
83	Sespe	Francisco Valdovinos	MC-1913	208 Orange St.	$125.00	March 2, 1979	$1,721.94
88	Sespe	Salvador R. Ramirez	MC-1913	264 Orange St.	$125.00	March 2, 1979	$1,721.94
88	Sespe	Enrique M. Lepe	MC-1913	264 Orange St.	$125.00	March 2, 1979	$1,721.94
49	Sespe	Fernando Martinez	MC-1913	118 South Main St.	$125.00	March 2, 1979	$1,721.94
50	Sespe	Alfredo M. Martinez	MC-1913	121 South Main St.	$125.00	March 2, 1979	$1,721.94
48	Sespe	Alejandro G. Gonzalez	MC-1913	117 South Main St.	$125.00	March 2, 1979	$1,721.94
46	Sespe	Librado Estrella	MC-1913	111 South Main St.	$125.00	March 2, 1979	$1,721.94
109	Sespe	Raul Z. Loza	MC-1913	35 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
108	Sespe	Justo G. Loza	MC-1913	31 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
111	Sespe	Clemente G. Baro	MC-1913	41 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
110	Sespe	Jose M. Diaz	MC-1913	39 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
140	Sespe	Miguel Torres	MC-1913	117 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
139	Sespe	Jose M. Contreras	MC-1913	111 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
65	Sespe	Jesus C. Murillo	MC-1913	2540 Oak Street	$125.00	March 2, 1979	$1,721.94
60	Sespe	Ysabel Gonzalez	MC-1913	2560 Oak Street	$125.00	March 2, 1979	$1,721.94

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue	Order for Damages
55	Sespe	Gaspar Martinez	MC-1913	2583 Oak Street	$125.00	March 2, 1979	$1,721.94
56	Sespe	Felix P. Arrellano	MC-1913	2580 Oak Street	$125.00	March 2, 1979	$1,721.94
12	Sespe	Daniel R. Tapia	MC-1913	39 North Main St.	$125.00	March 2, 1979	$1,721.94
14	Sespe	Salomon T. Chavez	MC-1913	33 North Main St.	$125.00	March 2, 1979	$1,721.94
16	Sespe	Francisco Murillo	MC-1913	29 North Main St.	$125.00	March 2, 1979	$1,721.94
104	Sespe	Francisco M. Ibarra	MC-1913	21 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
113	Sespe	Frank Rodriguez	MC-1913	47 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
122	Sespe	Agustin Alamillo	MC-1913	67 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
117	Sespe	Marcos R. Ochoa	MC-1913	55 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
134	Sespe	Julian Garcia	MC-1913	93 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
136	Sespe	Jose Estrella	MC-1913	97 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
138	Sespe	Antonio Becerra	MC-1913	107 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
125	Sespe	Ramiro S. Perez	MC-1913	77 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
129	Sespe	Juan DeLaRosa	MC-1913	58 Eucalyptus Dr.	$125.00	March 2, 1979	$1,721.94
900	Oak	Catarino G. Rangel	MC-1913	284B Oak Village Rd. 284A Oak Village Rd.	$280.00	March 2, 1979	$3,858.99
908	Oak	Francisco J. Perez	MC-1913	240A Oak Village Rd. 240B Oak Village Rd.	280.00	March 2, 1979	$3,858.99
902	Oak	Francisco M. Ruiz	MC-1913	274A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
907	Oak	Alfonso M. Ambrocio	MC-1913	252B Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
916	Oak	Antonio Ruiz	MC-1913	266A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40

Ranch House No.	Village	Defendant	Pre-Consolidated Case No.	Address	Damages Per Month	Date Damages Began To Accrue	Order for Damages
920	Oak	Cosme B. Alba	MC-1913	242A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
918	Oak	Jesus C. Toledo	MC-1913	254A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
922	Oak	Paulino G. Herta	MC-1913	232A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
928	Oak	Refugio M. Toledo	MC-1913	256A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
924	Oak	Julio M. Trujillo	MC-1913	288A Oak Village Rd. 288B Oak Village Rd.	$280.00	March 2, 1979	$3,858.99
927	Oak	Aurelio P. Chavez	MC-1913	278B Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
950	Oak	Paulin Magana	MC-1913	272A Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
934 & 935	Oak	Alfredo Mejia	MC-1913	290A Oak Village Rd. 290B Oak Village Rd.	$280.00	March 2, 1979	$3,858.99
937	Oak	Jesus G. Re; es	MC-1913	280B Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
938 & 939	Oak	Rogelio Rodriguez	MC-1913	270A Oak Village Rd. 270B Oak Village Rd.	$280.00	March 2, 1979	$3,858.99
945	Oak	Jubenal Valdovinos	MC-1913	236B Oak Village Rd.	$140.00	March 2, 1979	$1,928.40
	Sespe	Jaime O. Zepeda	MC-2551	2537 Wilson Avenue	$125.00	April 2, 1979	$1,594.53
	Sespe	Francisco Cesar	MC-2680	91 Eucalyptus Dr.	$125.00	April 12, 1979	$1,553.43
	Sespe	David Morales	MC-2690	102 South Main St.	$125.00	April 12, 1979	$1,553.43
	Sespe	Ventura Elizando	MC-2691	3011 E. Telegraph Rd.	$125.00	April 12, 1979	$1,553.43
	Oak	Jose L. Ortiz	MC-2687	266B Oak Village Rd.	$140.00	April 12, 1979	$1,739.80
	Oak	Alfonso Velasco	MC-2686	234A Oak Village Rd.	$140.00	April 12, 1979	$1,739.80
	Oak	Jose de Jesus Velasco	MC-3885	234B Oak Village Rd.	$140.00	May 14, 1979	$1,591.60

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CLERK

No. 83-1332

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

RIVCOM CORPORATION,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents,

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION OF RESPONDENT AGRICULTURAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Does petitioner present a substantial federal question concerning its right of access to State courts by alleging the existence of a conflict between a non-final municipal court judgment of eviction and the State Supreme Court's enforcement of an order of the California labor board forbidding petitioner from discriminatorily evicting its farmworker tenants?

2. Does petitioner present a substantial federal question by raising for the first time in these proceedings an alleged conflict between the ALRB's order and the federal Migrant and Seasonal Agricultural Workers Protection Act, without having previously raised the issue to any State tribunal?

STATEMENT OF THE CASE

Petitioner Rivcom Corporation is an agricultural employer subject to the jurisdiction of the California Agricultural Labor Relations Board (ALRB or Board). As such, on August 17, 1979, petitioner was adjudged by the Board to have committed certain unfair labor practices against its employees. (Pet. App., 99a-180a.) Of particular importance for these proceedings was the Board's finding that petitioner commenced proceedings to evict its farmworker tenants because of their union activities and in retaliation for their exercise of collective bargaining rights guaranteed them by State statute. (Pet. App., 113a.) The Board ordered petitioner to cease and desist from evicting its tenants for a discriminatory or retaliatory purpose. (Pet. App., 117a.)

Prior to issuance of the Board's order, petitioner had commenced eviction

proceedings against its employees in the Ventura County Municipal Court. However, that court delayed its proceedings in order to permit the ALRB to adjudicate the merits of the unfair labor practice charges. (Pet. App., 192a, para. 10.) Trial of the municipal court action commenced on October 22, 1979, two months after issuance of the Board's decision and order. (Pet. App., 181a.)

The municipal court concluded that it was not bound by the factual findings of the ALRB (Pet. App., 192a, para. 9), and therefore made its own contrary findings. In particular, the municipal court found that petitioner's "dominant purpose for evicting defendants, and each of them, is not retaliation against defendants for their exercise of any statutorily protected right, nor discrimination against any defendant because of union membership and activity." (Pet. App., 190a, para. 63.) Based upon

these contrary findings, the municipal court entered judgment for petitioner, evicting the farmworker tenants from their housing and awarding petitioner damages. (Pet. App., 201a).

The tenants appealed the judgment to the appellate department of the superior court. In the meantime, petitioner had filed in the Court of Appeal a petition for review of the Board's order pursuant to California Labor Code section 1160.8. (Cf., 29 U.S.C. sec. 160(f).) On petition of both the tenants and the Board, the California Supreme Court stayed the execution of the municipal court judgment pending disposition of the proceedings to review the Board's decision and order. (Pet., 9; Pet. App., 32a.)

Ten months after issuance of the ALRB's decision and order, in June 1980, the County of Ventura obtained an injunction requiring petitioner and its lessor to make

repairs to the sewage and water facilities at the site of the disputed housing. Petitioner appealed that decision and obtained a judgment from the Court of Appeal reversing the injunction. On petition of the tenants, the California Supreme Court granted hearing, vacating the decision of the appellate court. (Pet., 12.)[1/]

On October 25, 1982, the Court of Appeal issued its decision on review of the Board's order. The court set aside the Board's order and remanded the matter to the Board for reconsideration. (Pet. App., 89a.) The California Supreme Court granted hearing, thereby vacating the appellate court decision. (See Hazelton v. City of San Diego, 183 Cal.App.3d 131, 136 (1960);

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1. On February 2, 1984, the California Supreme Court remanded the case to the Court of Appeal for reconsideration in light of Rivcom v. Agricultural Labor Relations Bd., the decision which is the subject of these proceedings. (Pet. App., 1a.)

People v. Woods, 19 Cal.App.2d 556, 560 (1937); Cal. Rules of Court, rules 976(d), 977.) The appeal of the municipal court judgment was meanwhile proceeding. (Pet. App., 32a.)

On October 17, 1983, the California Supreme Court issued its decision, which is the subject of the instant proceeding. In that decision, the Court upheld the Board's findings that petitioner's eviction of its tenants was unlawfully motivated. (Pet. App., 17a.) The Court issued a decree enforcing the Board's order, including the order that petitioner cease and desist from evicting its employees in furtherance of an antiunion policy. (Pet. App., 27a, fn. 25; 34a.)

ARGUMENT

Petitioner presents two arguments as grounds for a writ of certiorori. First, petitioner contends that the California Supreme Court violated its First Amendment

right of access to the courts. (Pet., 15.) Petitioner characterizes the Board's order as "enjoining enforcement of a valid state-court judgment." (Pet., i.)

Second, petitioner argues that the Supreme Court decision "conflicts with federal law and is invalid under the Supremacy Clause of the United States Constitution." (Pet., 23.) This is so, argues petitioner, because the Board's order requires the "lessee of a new owner of a farm to maintain migrant labor housing that does not, and, as a practical matter, cannot comply with federal or state health and safety requirements, when the operation of such housing is prohibited by federal law." (Pet., i.)

Respondent will demonstrate that petitioner's first argument mischaracterizes the facts: neither the Board's order nor the Supreme Court's decree of enforcement thereof enjoins execution of the municipal

court judgment. As for petitioner's second argument, respondent will demonstrate that this issue was never raised to the ALRB or to the State Supreme Court and is therefore not properly before this Court.

I

NEITHER THE BOARD'S ORDER NOR THE DECREE OF ENFORCEMENT ENJOINS EXECUTION OF THE MUNICIPAL COURT JUDGMENT. MOREOVER THE ISSUES RAISED BY THE STATE SUPREME COURT'S DECISION CONCERN ONLY A STATE'S ALLOCATION OF PRIMARY JURISDICTION AMONG ITS OWN COURTS AND AGENCIES.

Petitioner has misrepresented the Board's order and that of the Supreme Court, characterizing those orders as "blotting out [the municipal court] judgment as completely as if it had never existed." (Pet., 15.) Petitioner complains that the Supreme Court did not harmonize the Board's order with the judgment of the municipal court, that "[i]t did not even acknowledge the careful and detailed findings and conclusions of the trial court." (Ibid.) The simple answer,

of course, is that the municipal court's judgment was not before the Court. That judgment is on appeal to the appellate department of the superior court. The trial court record was not before the Supreme Court and, in any event, was immaterial to the question under consideration: "Were the findings of the Board supported by substantial evidence?" The proceedings from which the Supreme Court's decision issued, it will be remembered, were proceedings under California Labor Code section 1160.8 to review the decision and order of the Board.

As is evident from the very face of the Board's order (Pet. App., 117a), the Board prohibited petitioner only from "[d]iscouraging membership of employees in the UFW or any other labor organization by...attempting to evict, or evicting those employees..., except as authorized by Labor Code section 1153(c) of the Act." The

Supreme Court recognized the limited scope of the order, observing that "[t]he cease-and-desist order is directed only at evictions in furtherance of the antiunion policy." (Pet. App., 27a, fn. 25.) Absolutely no mention is made by the Board or the Supreme Court of the municipal court judgment or any other judgment.

To be sure, respondent would be less than candid were it to pretend that the Supreme Court decision had no impact whatsoever on the municipal court judgment. There is certainly an evident conflict between the two orders: On the one hand, the Board found that petitioner's eviction efforts were discriminatorily motivated and retaliatory. Those findings were upheld by the State Supreme Court. On the other hand, the municipal court found no unlawful motivation; those findings are currently on appeal. The Board's decision and order were certainly before the municipal court at the

time of trial, but the court chose to ignore the Board's findings. (Pet. App., 192a, paras. 9, 10.) The question before the superior court in the appeal of the municipal court judgment, then, will be the extent, if any, to which the municipal court was bound by the findings of the administrative agency.

Such an inquiry does not rise to the level of a substantial federal question, however. The issue is only one of "primary jurisdiction." "The doctrine of primary jurisdiction....determines whether the court or the agency should make the initial decision." (Davis, Administrative Law Text (3d ed.), sec. 19.01, p. 373.) "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or

perchance to make unnecessary later judicial proceedings." (Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947).)

California appellate courts have held that the Board has "exclusive primary jurisdiction over all phases of the administration of the Act as regards unfair labor practices" (United Farm Workers v. Superior Court, 72 Cal.App.3d 268, 271 (1977)), and that the initial determination as to whether arguably protected conduct is in fact protected must be made by the Board and not by the court. (Banales v. Municipal Court, 132 Cal.App.3d 67, 70 (1982).) Indeed, the California Supreme Court certainly held here that the Board had primary jurisdiction to consider whether an eviction amounted to an unfair labor practice. (Pet. App., 27a-28a, fn. 25.) However, the precise question of whether the municipal court is bound by the findings of the Board has yet to be squarely decided.

No doubt such a decision will be the outcome of the appeal from the municipal court judgment in favor of petitioner.

The fact, however, is that there is no injunction of the municipal court judgment; there is only an apparent conflict between the order of the Board and the non-final judgment of the municipal court. The appellate department of the superior court could conclude that the municipal court was not bound by the findings of the Board, and may affirm the judgment of the municipal court as supported by the evidence before the trial court. Such a conflict would undoubtedly require final resolution by the State Supreme Court.

On the record before this Court, then, it is quite apparent that the facts do not support petitioner's assertion that the order of the Board enjoins enforcement of

the municipal court judgment.[2/] Moreover, such conflict as does exist by virtue of the Supreme Court's decision creates only an issue of primary jurisdiction intra-State, not a question of First Amendment right of access to State courts as was presented in Bill Johnson's Restaurants, Inc. v. N.L.R.B., __ U.S. ___, 103 S.Ct. 2161 (1983).

Petitioner relies on Bill Johnson's to support its claim of an absolute right to invoke judicial eviction proceedings, contending that the Board's cease-and-desist order interferes with that "right". But Bill Johnson's manifestly does not stand for the proposition that California is powerless to place limits on petitioner's use or abuse

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2. The tenants, however, would doubtless welcome petitioner's stipulation to that effect, inasmuch as such a stipulation would make their appeal of the municipal court judgment moot.

of the State's judicial processes. In fact, as a matter of California law petitioner does not have an absolute right to judicial process for eviction. Under State law, judicial eviction proceedings may not be used to retaliate for a tenant's exercise of rights protected by statute -- including the Agricultural Labor Relations Act. (Vargas v. Municipal Court, 22 Cal.3d 902 (1978); S.P. Growers Assn. v. Rodriguez, 17 Cal.3d 719 (1976).) Bill Johnson's is thus irrelevant to these proceedings because, as a matter of California law, proof of retaliatory motive is an absolute defense to an eviction action; the only question is whether it is the Board or the municipal court which makes the determination as to motive. That is purely a matter of State law and application of the principles of primary jurisdiction. Indeed, the Board's cease-and-desist order does nothing more than prohibit petitioner from doing that

which State law forbids in any event, viz., evicting its tenants in retaliation for exercise of statutory rights.

Put simply, petitioner's extension of the holding in Bill Johnson's to the situation here would wholly destroy the doctrine of primary jurisdiction. For, under petitioner's reasoning, a State could never vest exclusive primary jurisdiction of a subject matter in an administrative agency and divest its courts of jurisdiction to adjudicate controversies within the agency's area of expertise. Respondent does not believe that this Court intended such a result.

In conclusion, petitioner has failed to present a substantial federal question because, as a factual matter, the California Supreme Court's decision does not enforce the Board's cease-and-desist order as against the municipal court's judgment of eviction. Moreover, such conflict as is

created by the decision of the Supreme Court involves only issues of California's allocation of primary jurisdiction over labor disputes between its courts and its administrative agency.

II

PETITIONER PRESENTS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE MIGRANT AND SEASONAL AGRICULTURAL WORKERS PROTECTION ACT ("MSAWPA"). NOT ONLY DID PETITIONER FAIL TO RAISE ANY SUCH ISSUE TO THE STATE TRIBUNALS, THE ISSUE IS PATENTLY FRIVOLOUS.

In its petition, Rivcom argues for the first time that the ALRB's order requires it to operate a labor camp in violation of the Migrant and Seasonal Agricultural Workers Protection Act (MSAWPA), 29 U.S.C. sections 1801-1872,[3/]

3. Although the MSAWPA only became effective on January 14, 1983, MSAWPA was enacted to replace the Federal Farm Labor Contractor Registration Act of 1963 (FLCRA), 7 U.S.C. sections 2041-2053; at least for purposes of this case, MSAWPA did not substantially change the provisions of its predecessor statute.

and that the Board order is thus "untenable under the Supremacy Clause of the United States Constitution." (Pet., 23.) The short answer to petitioner's contention is that Rivcom is precluded from raising this argument in this Court, because it was never presented to any state tribunal; the issue has therefore been waived. (Herndon v. State of Georgia, 295 U.S. 441, 443 (1935).)

The Board will, however, briefly respond to the merits of Rivcom's argument. Undoubtedly petitioner did not earlier raise the asserted conflict between the Board's order and the MSAWPA, because there is no record evidence supporting Rivcom's assertion that the housing on Rancho Sespe is hazardous or unfit for human habitation,

as petitioner now contends. (Pet., 23.)[4/] Petitioner did not introduce any evidence regarding the condition of the housing at the Board's unfair labor practice proceeding. Four years later, Rivcom asked the Supreme Court to take judicial notice of various administrative determinations and/or actions of a county agency concerning the employee housing at Rancho Sespe. The Supreme Court denied the motion for judicial notice, but assumed -- without deciding -- that the events represented by the documents offered by Rivcom and Riverbend were true. (Pet. App.,

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4. None of the evidence regarding the condition of the housing that was before the municipal court was before the ALRB or the State Supreme Court; it is thus not part of the record in this case. Petitioner notably fails to provide any citations to the adminstrative record in support of its contentions regarding the condition of the housing. Rivcom's discussion of the conditions at the Rancho Sespe housing at pages 24-25 of its petition is based totally on "facts" outside the record and should therefore be disregarded.

33a.) For purposes of review of the Board's order, the condition of the housing was irrelevant. The Court noted that the Board's order is not "an absolute command to maintain the labor camp permanently....[but] is directed only at evictions in furtherance of the antiunion policy." (Pet. App., 27a, fn. 25.) The Board conceded, as recognized by the Court, that its order "runs only against the growers and does not prevent the county from taking actions immediately necessary under state and county law to protect life and limb." (Pet. App., 33a.)

Thus, the only issue is whether the Board's order requires petitioner to maintain the housing in substandard condition; that is the gravamen of petitioner's complaint. The Court stated that the Board's order "implicitly includes the command to maintain the housing in habitable condition at least until the growers reach agreement or good-faith

impasse with the union about its future.... In any enforcement proceeding...they may face a heavy burden in showing that an eviction required by health or safety hazards on the property was not the result of their efforts to avoid the Board's directive." (Pet. App., 33a.) Thus, if anything, the Board's order requires petitioner to maintain the housing in a habitable state -- a state fully consistent with the requirements of MSAWPA.

In summary, then, petitioner's second proffered ground for assertion of jurisdiction by this Court is patently frivolous. The Board's order manifestly requires no violation of federal law; to the contrary, if anything, it requires compliance with federal law pending collective bargaining negotiations. Most importantly, petitioner did not raise this

purported conflict with federal law either to the Board, to the State Court of Appeal, or to the California Supreme Court.

CONCLUSION

Inasmuch as petitioner has raised no substantial federal question for consideration by this Court, the petition for writ of certiorari should be denied.

Dated: April 18, 1984

Respectfully submitted

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No. 83-1332

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RIVCOM CORPORATION,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, and
UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Petition for A Writ of Certiorari
to The Supreme Court
of The State of California

REPLY BRIEF FOR PETITIONER

Respondent Agricultural Labor Relations Board ("ALRB") opposes Petitioner Rivcom Corporation's[1/] petition for certiorari with an amalgam of legalistic rhetoric, on the one hand, and evidentiary hide-and-seek on the other. It attempts to avoid the thrust of this Court's decision

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1/ Rivcom Corp. is a wholly-owned subsidiary of Riverbend Farms, Inc.

in Bill Johnson's Restaurants, Inc. v. NLRB, 103 S. Ct. 2161 (1983), by holding up the veil of primary jurisdiction. It then attempts to dispose of Rivcom's Supremacy Clause concerns by faulting Rivcom for not introducing evidence the agency itself vigorously and successfully opposed. As is demonstrated below, both these efforts must fail.

I. Access To Courts

The ALRB seeks to sidestep the effect of Bill Johnson's by characterizing the conflict between the Board's order and the municipal court judgment as a mere question of "primary jurisdiction." Thus, the argument goes, anything "arguably protected" by the Agricultural Labor Relations Act comes within the Board's primary jurisdiction and that alone gives the Board the exclusive right to make the "initial determination as to whether arguably protected

conduct is in fact protected." Brief in Opposition of Respondent Agricultural Labor Relations Board ("Opp.") at 12. Rivcom's argument, the Board asserts, would "destroy" the doctrine of primary jurisdiction because "a State could never vest exclusive primary jurisdiction of a subject matter in an administrative agency and divest its courts of jurisdiction to adjudicate controversies within the agency's area of expertise." Opp. at 16.

This "floodgate" argument is so exaggerated that even the Board has to acknowledge its flaws. Thus, the Board is admittedly unable even to "pretend" that the State Supreme Court's decision "had no impact whatsoever" on the municipal court judgment. Opp. at 10. Moreover, it is forced to acknowledge the "evident conflict between the two orders." Opp. at 10. Indeed, the Board even admits that "the precise question of whether the

municipal court is bound by the findings of the Board has yet to be squarely decided." Opp. at 12. This question, it suggests, will be "before the superior court in the appeal of the municipal court judgment," Opp. at 11, and may eventually "require final resolution by the State Supreme Court." Opp. at 13.

That precise question, however, has already been answered by this Court in Bill Johnson's -- and its conclusion was that the agency must be bound by the court's findings of fact.

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge. Hence, we conclude that if a state plaintiff is able to

> present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the . . . unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded.

103 S. Ct. at 2171-72. Contrary to the ALRB's professed fears, this Court evinced no concern that its Bill Johnson's decision might "destroy" the primary jurisdiction of the National Labor Relations Board.

Simply put, the flaw in the ALRB's argument is this: Bill Johnson's did not effect a total substitution of court for agency. Rather, the case held that genuine issues of material fact and genuine state-law legal questions must be resolved in a judicial, rather than an administrative forum. 103 S. Ct. at 2171-72. Those factual and legal findings are binding to the extent they overlap with issues before the agency.

The Board further mischaracterizes Rivcom's position when it states the truism that "Bill Johnson's manifestly does not stand for the proposition that California is powerless to place limits on petitioner's use or abuse of the State's judicial processes. In fact, as a matter of California law, petitioner does not have an absolute right to judicial process for eviction." Opp. at 14-15 (emphasis in original). Again, the Board misses the thrust of this Court's ruling. Bill Johnson's and the federal constitutional law on which it is based provide only that an agency cannot cut off access to courts; they do not guarantee a victory there. California properly can and has fenced in the right to use its judicial processes by requiring that an eviction not be pursued in retaliation for the exercise of protected rights. The issue of whether an

eviction was retaliatory, however, must be decided by the court, not by the ALRB.[2/] Rivcom argues only that whatever the outcome of the state court proceedings, the court's factual and legal conclusions must govern in the administrative forum as a matter of constitutional right.

Having failed to impeach Bill Johnson's on the law, the ALRB seeks to distinguish it factually. Bill Johnson's, we are told, cannot govern the instant case because court proceedings in that case were enjoined, while in Rivcom's case "there is no injunction of the municipal court judgment; there is only an apparent conflict between the order of the Board

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2/ In this case, the municipal court ruled that there was no retaliatory motive behind Rivcom's attempts to evict the tenants. Appendix to Petition for Certiorari at 190a.

and the non-final judgment of the municipal court." Opp. at 13.[3/] While it is true that no "injunction" was actually issued against the unlawful detainer action, the State Supreme Court's decision "stayed enforcement" of the judgment in that action exactly as an injunction would have.[4/]

Indeed, the ALRB's depiction before this Court of the municipal court judgment as tentative and non-final is completely at odds with the position the Board has

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3/ That the municipal court's judgment is subject to appeal and may be "non-final" is irrelevant for purposes of this case. This Court did not discuss any need for finality in Bill Johnson's; indeed, so far as appears from the reported decision, the trial court in that case had not yet issued any decision.

4/ The Supreme Court stated in its October 1983 decision, "[w]e have stayed enforcement of [Rivcom's unlawful detainer] judgment pending resolution of this action." Appendix to Petition for Certiorari at 32a.

advanced throughout the course of this litigation, including its most recent filings. For example, in a brief filed with the California Second District Court of Appeal on March 15, 1984,[5/] the ALRB insisted that the Board's order, as enforced by the Supreme Court's October 1983 order, conclusively precludes Rivcom from either evicting the tenants or demolishing the housing -- thus leaving Rivcom only one course of action: to expend millions of dollars on repairs.

5/ As noted in Rivcom's petition for certiorari, an appeal of the California Second District Court of Appeal's decision of July 29, 1983, vacating a lower court injunction that ordered Rivcom and Newport to repair the housing, was pending before the State Supreme Court in October 1983, when it issued the order under review. Petition for Certiorari at 11-12. On February 2, 1984, the California Supreme Court remanded that case to the appellate court for reconsideration in light of the Supreme Court's October 1983 decision. The brief referred to in the text was filed with the appellate court after that remand.

The ALRB cannot have it both ways. Its attempt to obscure the issues before this Court by focusing on the distinction between an "injunction" and a "stay" is specious and must be rejected.

II. Supremacy Clause

The ALRB makes two arguments in response to Rivcom's position that the order under review violates the Supremacy Clause because it requires Rivcom to maintain housing that does not and, as a practical matter, cannot meet the applicable standards of federal law.

First, the ALRB incorrectly asserts that this issue was not raised below. Opp. at 18. In fact, the issue was raised both before the ALRB itself[6/] and in the

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6/ See Brief In Support Of Exceptions To The Decision Of The Administrative Law Officer (filed July 6, 1979), In the Matter of Rivcom Corp., ALRB Case Nos. 79-CE-1-OX and 79-CE-4-OX, at 96-97.

judicial appeal from the Board's decision.[7/] The Board cannot seriously claim to have been without notice of this issue.

The second prong of the ALRB's attack is the assertion that "there is no record evidence supporting Rivcom's assertion that the housing on Rancho Sespe is hazardous or unfit for human habitation, as petitioner now contends." Opp. at 18 (emphasis in original). Thus, we are told, "[n]one of the evidence regarding the condition of the housing that was before the municipal court was before the ALRB or the State Supreme Court." Opp. at 9 n.4.

In the first place, the ALRB's blanket assertion is false. The record compiled

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7/ See Rivcom Corporation's Memorandum Of Points And Authorities In Opposition To ALRB's Petition For Temporary Relief Staying A Ventura County Municipal Court Action (filed Oct. 18, 1979) at 20-21, and Rivcom's Opposition Brief To ALRB's Second Petition For Temporary Relief (filed Feb. 11, 1980) at 20, Rivcom Corp. v. ALRB, No. 5 CIV 5121 (Cal. 5th Dist. Ct. App.).

before the Administrative Law Officer does contain evidence substantiating the dilapidated condition of the housing at the time Rivcom entered the lease. Indeed, counsel for the ALRB expressly admitted during the hearing that "[t]here is evidence in the record concerning the condition of the property," and offered rebuttal evidence. Tr. Vol. XVII, at 55.

Moreover, the ALRB fails to reveal to this Court the reason why there is only limited record evidence on this issue: the agency itself consistently and successfully opposed the introduction of such evidence at every step of the proceedings.

During the hearing before the Administrative Law Officer, Rivcom presented, over objection, the testimony of John Kirkpatrick, a citrus farmer from a neighboring area. Mr. Kirkpatrick spent five or six hours touring Rancho Sespe on March 3, 1979, approximately a month and a

half after Rivcom leased the ranch. Tr. Vol. XI, at 156. He observed the labor camps and described the houses there as "old and obsolete." Id. at 173-74. Dick Richardson, another local farmer, testified that he viewed the labor housing about a year before the hearing, and that it was "in poor condition" and a "firetrap." Tr. Vol. XIII, at 56-57, 61, 63. Mr. Harris himself testified that Rivcom had been noticed by the county for having inadequate domestic water and sewage systems in the labor housing, among other problems, and that at the time of the hearing the federal Department of Labor was investigating Rivcom for illegal maintenance of a labor camp. Tr. Vol. XIV, at 220-22, 225. Mr. Harris' testimony concerning the state of the ranch's water and sewage systems was corroborated by Robert Gallagher, a Ventura County health official. Tr. Vol. XVII, at 61-62.

On the objection of ALRB counsel, the Administrative Law Officer permitted the introduction of further testimony to corroborate the "terrible condition" of the housing not for its truth, but solely to rebut any inference that Mr. Harris secretly intended not to raze the housing. Tr. Vol. XVI, at 176-78.

In its exceptions to the Administrative Law Officer's decision, Rivcom objected to the Administrative Law Officer's failure to find that the camps are in poor condition. Exception No. 162. Rivcom also asked the California Court of Appeal to take judicial notice that the housing had been declared to be "defective to an extent that the life, limb, health and property of the dwelling occupants. . . is endangered."[8/]

8/ Petitioner Rivcom Corporation's And Petitioner Riverbend Farms, Inc.'s Request

(footnote continues)

not responsible, or to violate federal law. The issue cannot be smoothed over, as the ALRB attempts to do, by the bland assertion that this case does not merit this Court's attention because "[t]he Board's order manifestly requires no violation of federal law." Opp. at 21. The effect of the Board's order is to force Rivcom to violate federal law by keeping a substandard camp open and occupied.

CONCLUSION

The course pursued by the ALRB and the California courts throughout this litigation betrays a studied disregard for the constitutional principles this Court elaborated in its Bill Johnson's decision. By permitting the decision below to stand, this Court will allow the ALRB to leverage its constitutional violations into an intolerable choice for the petitioner:

either to expend vast sums to remedy conditions for which it is not responsible, or to continue to violate federal law. Thus, Rivcom respectfully requests that its petition for certiorari be granted.

Respectfully submitted,

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Finally, as the Board itself notes, Rivcom asked the State Supreme Court to take judicial notice of documents showing that the labor housing had been condemned as unsafe and uninhabitable. Opp. at 19. This request was denied, although the court assumed, without deciding, that the events depicted therein were true. Appendix to Petition for Certiorari at 33a n.34.

Evidence showing that the labor housing was in sorely dilapidated condition before Rivcom leased the ranch is indeed relevant to the Board's order, which requires Rivcom "to maintain the housing in habitable condition." Id. The California Supreme Court's order requires Rivcom either to expend millions of dollars to remedy conditions for which it was

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8/ (footnote continued)

For Judicial Notice; And Memorandum Of Points And Authorities In Support Thereof (filed Dec. 31, 1981), Rivcom Corp. v. ALRB, No. 5 CIV 5121 (Cal. 5th Dist. Ct. App.) at 1.